

Precedent and Originalism: Legal Interpretation on the Contemporary Supreme Court

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Abstract

In 2022, the United States Supreme Court overruled some of its most contentious decisions, *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which had been law for several decades. Four of the five votes in the case, *Dobbs v. Jackson Women's Health Organization*, to overturn *Roe* and *Casey* came from the self-described originalist Justices—Justice Thomas, Justice Gorsuch, Justice Kavanaugh, and Justice Barrett. Originalism is one of the most prominent modes of judicial interpretation, but it often conflicts with *stare decisis*, also known as precedent. This paper explores how originalism and precedent can work together, how they worked together in the *Dobbs* decision, and the potential implications of the *Dobbs stare decisis* analysis on other substantive due process precedents.

Keywords: originalism, precedent, *stare decisis*, substantive due process

I. Introduction

Precedent, the adherence to past decisions, plays a vital role in the American judicial and legal system. Constitutional law, in specific, is fundamental in defining constitutional rights. Though the Constitution is the most important political document, it is short and lacks specificity. As a result, to fully understand the scope of the Constitution's meaning, the branches of government must act and respond to one another over time. The judiciary, as an example, uses previous judicial holdings and doctrines (precedent) to help itself build a stable and continuous body of law. However, the centrality of precedent in judicial decision-making also introduces a potential challenge—namely, how the courts should deal with precedents they subsequently deem to be “wrong” or “inadequate.” This problem is especially salient for judges who adhere to originalism, the judicial philosophy that posits that the Constitution ought to be interpreted in light of what it meant when it was ratified. This paper investigates this puzzle by examining what precedent and originalism are, how they generally work together, and the implications for some of the Supreme Court's substantive due process cases.

II. Precedent

Judges employ various methods of judicial interpretation in their decision-making process. Originalism, textualism, structuralism, consequentialism (prudentialism), aspirationalism, and doctrinalism are examples of different modalities that judges employ (Gillman et al. 9-11). Judges often utilize a combination of approaches, creating unique and distinctive judicial philosophies. However, all judges adhere to at least some precedents, or *stare*

decisis (doctrinalism), and believe that others should be overturned.¹ The judicial philosophy of each judge impacts the determination of which precedents they believe should be upheld and which should be overruled (Barrett, “Precedent” 1711).

It is first necessary to understand what precedential reasoning is. Frederick Schauer defines precedential reasoning as a current court adhering to the decision of a past court *because* of that decision’s *status* as precedent, irrespective of the current court’s agreement or disagreement with the reasoning behind that decision (40). It is not the adherence to a past decision because the current court is convinced that the previous court correctly decided the issue or is persuaded by the earlier court’s reasoning (Schauer 38). For example, Chief Justice John Roberts used precedential reasoning in *June Medical Services, L.L.C v. Russo*, when he voted to affirm *Whole Woman’s Health v. Hellerstedt* despite dissenting in *Whole Woman’s Health* solely because it was precedent.

Adherence to precedent has many noteworthy benefits. The first is that precedent promotes legal consistency at a particular point in time. If every court decided cases independently of one another, there would be a lack of uniformity in legal decisions and rules across the United States. Instead, precedent, or more specifically, vertical precedent, ameliorates this issue by helping to ensure that similar cases are decided similarly (Kozel, “THE SCOPE” 205). In the United States, the federal and state court systems are structured hierarchically so that certain courts have authority over others. This creates a vertical system whereby lower courts are required to obey the decisions of all courts above it in rank (Dobbins 1460). For example, the Supreme Court holds authority over and hears cases from all twelve Circuit Courts of Appeals and the Federal Circuit Court (“About the U.S. Courts”). One criterion the Supreme Court

¹ “Stare decisis” is short for “*stare decisis et non quieta movere*,’ which means ‘stand by the thing decided and not disturb the calm’” (Kavanaugh, Concurring opinion, *Ramos v. Louisiana* 1).

Justices consider when determining whether to grant a *writ of certiorari* is whether there are conflicts in decisions made on similar cases between different circuit courts (“Supreme Court Procedures”). Vertical precedent helps ensure that citizens in California retain the same legal and constitutional rights as those in New York. It is necessary to note, though, that a court does not engage in precedential reasoning when it adopts the position of a previous court that does *not* hold authority over the current court in question. This means that the U.S. Court of Appeals for the Ninth Circuit Court is not adhering to precedent by adopting a position that the U.S. Court of Appeals for the Third Circuit outlined in one of its decisions because the Third Circuit holds no authority over the Ninth Circuit.

A second benefit is that precedent provides stability in the legal system over time (Lewis 874). For legally similar cases to be treated similarly, courts write holdings that contain legal reasoning to provide guidance for the future—hence why decisions often have significant implications for large swaths of individuals beyond the direct parties to the case. While vertical precedent helps create uniform standards that are thereafter applied to cases heard by lower courts, it is insufficient as many cases never reach higher courts for those uniform standards to be created (“About the U.S. Courts;” “Appellate Courts”). Horizontal precedent—a court following its own past decisions irrespective of agreement with its decisions (Kavanaugh, Concurring opinion, *Ramos v. Louisiana* 10n5)—is thus necessary to achieve this long-term stability because it creates consistency among similar cases within each court. This consistency creates predictability, which allows those under the law to plan and structure their lives meaningfully (Lewis 881), preventing chaos and confusion within the general population.

Furthermore, precedent promotes efficiency by not forcing judges to reconsider every issue during every case they hear (Macey 96). As Justice Antonin Scalia explained, without

precedent, the Supreme Court would be constantly forced to question whether it could even hear each case before them (referring to *Marbury v. Madison* [Scalia, “Legally Speaking” 27:40-28:28]). For courts to decide the relevant questions before them and engage in the substance of the parties’ arguments, they must accept certain aspects of the case as settled. Finally, precedent may help curb judicial discretion in decision-making by placing greater emphasis on learned wisdom and knowledge over time rather than judges’ opinion in the present moment (Kozel, “Precedent” 793).

Nonetheless, there are downsides to adhering to strong norms of precedents in judicial decision-making. For example, judges may be forced to decide cases in ways they believe are legally incorrect, which has the potential to perpetuate injustices and impact the operation of the entire legal system. For example, *Plessy v. Ferguson* was law in the U.S. for decades before it was overruled in *Brown v. Board of Education*. Had the *Brown* Court adhered to *Plessy* because of its status as precedent, “separate but equal” (*Plessy v. Ferguson* 552) would have remained the legal standard. Using precedent may also disincentivize judges from justifying their decisions or provide a means for judges to disguise their policy preferences and partisan motivations as law (Thomas, “Justice Clarence Thomas” 11:03-12:25).

Precedent also gives judges of the past disproportionate power over current judges in developing and applying legal principles. This can result in looking to the past at the expense of looking to the future, as well as hindering desirable or necessary change based on evolving circumstances (Garner et al. 357). A lack of flexibility in deciding cases and applying the law is also a potential negative consequence that may prevent judges from considering the nuances of each situation and rendering tailored decisions or providing appropriate remedies (Barrett,

“Precedent” 1712). Finally, multiple relevant precedents may work together on top of one another or contradict each other, making adjudication complex and burdensome.

This is not an exhaustive list of precedent’s advantages and disadvantages, though it covers many significant considerations. Nevertheless, what counts as authoritative precedent in each case before a court is not always clear. Many cases may be similar but are rarely identical (Schauer 44). A court’s rationale can help determine whether a relevant similarity is at play and, thus, whether precedent applies. However, there is almost always room to dispute whether cases are similar *enough* (Schauer 58). In addition, lower courts may read precedents narrowly or broadly in order to reach their desired outcome (Gewirtzman 472). More specifically, Schauer makes a distinction between the “holding” and “dicta,” with the holding defined as “the legal rule that determines the outcome of the case” (Schauer 54) and dicta being “something extra, and something that is not strictly necessary to reach, justify, or explain the outcome of the case” (Schauer 56). While the two are discrete, lower courts can argue that precedents do not apply because the relevant portions are dicta or, conversely, that precedent does apply because the relevant portions are part of the holding and are not dicta (Stinson 221). Regardless, the issue of deciding what counts as precedent reveals that there is ample room for judges to introduce their political and personal preferences under the guise of arguing that a previous case is, or is not, authoritative in the current case because of its status as precedent. Some evidence supports the notion that this does occur, with Justices more likely to uphold precedent when it aligns with their political values (Segal and Spaeth 983).

One final note is that the threshold for overruling precedent has differed in practice depending on whether it involves statutory or constitutional interpretation (Kavanaugh, Concurring opinion, *Ramos v. Louisiana* 4-6). The Supreme Court has historically been more

unwilling to overrule precedent related to statutory interpretation because subsequent legislation can alter those decisions (Kavanaugh, Concurring opinion, *Ramos v. Louisiana* 4; Murrill 8-9). However, the Court has been more willing to overrule precedent related to constitutional interpretation because a new constitutional amendment or the Court overruling the precedent are the only two ways to change that decision (Garner et al. 352; *Agostini v. Felton* 235). Justice Clarence Thomas disagrees with this distinction, arguing that the same principles should apply to both statutory and constitutional interpretation (Thomas, Concurring opinion, *Gamble v. United States* 48). Nonetheless, the distinction exists in practice, and this paper will focus on precedent as it applies to constitutional interpretation.

III. Originalism

Precedent is utilized by virtually all judges, at least to some extent, regardless of their method of judicial interpretation. One of the most prominent methods of judicial interpretation is originalism. Paul Brest is believed to have coined the term in 1980 (204), but the concept of originalism goes back to the beginning of American constitutionalism (Whittington, “The New Originalism” 599). During the 1950s and 1960s, the Warren Court encountered significant criticism for ignoring history or misconstruing it, paving the way for the reintroduction of originalism during the 1970s as a means of restraining the Court’s power into alignment with its original role (O’Neill 68, 97, 133). The theory continued to rise in prominence during the 1980s due to the active discussions, debates, and exploration during the Reagan Era (O’Neill 133; Whittington, “Originalism” 376).

At its core, originalism is the idea that the Constitution's meaning is fixed and must be interpreted in light of what its provisions meant when they were ratified. Thomas Jefferson succinctly described originalism in a letter to Justice William Johnson, writing:

On every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was past.

Although many nonoriginalists account for original meaning in their jurisprudence, originalists place a much greater emphasis on the authoritative nature of the Constitution's original meaning (Farber and Siegel 8-9).

To determine the original meaning of constitutional provisions, judges look to the text of the Constitution, its structural design, and other external historical information (Whittington, "Originalism" 379, 383, 390). Originalism is not about reading the constitutional text narrowly or broadly but *faithfully* (Whittington, "Originalism" 389-390). However, originalism does not preclude the invocation of other modes of judicial interpretation alongside it. For example, in *District of Columbia v. Heller*, Justice Scalia included consequentialist reasoning within his originalist opinion when he wrote that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or imposing conditions and qualifications on the commercial sale of arms.... (626-627)

This statement does not indicate that the core of Justice Scalia's argument was not originalist, only that originalism was not the only modality he relied upon.

There are many justifications for the use of originalism, well summarized by Kiran Iyer and Randy Barnett (Barnett, “An Originalism for Nonoriginalists”). However, the underlying idea is that the purpose of a constitution—to constrain the ever-changing passions of the majority from violating the rights of the minority—is undermined if the constitution’s meaning can change over time. In other words, if the meaning changes, then there is no constraining function, as present majorities can interpret the text to encompass whatever they desire at that moment.

Many criticize originalism based on the assumption that current generations should not be forced to abide by the will of founders who died over 200 years ago (“dead-hand argument” [Alicea]). Defenders of originalism counter this by arguing that originalism does not presuppose special or superior wisdom on the part of the Founding Fathers (Whittington, “Originalism” 381). Instead, it is an effective tool for constraining interpretation and the discretion of current judges in alignment with the purpose of a constitution, as well as preserving the original function of the judiciary. Alexander Hamilton wrote in Federalist No. 78 that

[t]he judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment...And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments...It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to

ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

In other words, the judiciary's purpose is to make judgments and interpret fundamental law, not to act as a super-legislature by making laws and public policy decisions based on its preferences. Originalism provides an effective method for staying true to that purpose by prompting judges to make decisions in line with the Constitution's original meaning rather than their desired outcomes.

Critics may point out that if originalism's function is to constrain interpretation to mediate the passions of majority will and constrain judicial discretion, then there is nothing special about originalism per se—one could, for instance, argue that courts should adhere to what the Constitution meant in 1900, rather than 1787 or 1791. While an interesting argument, it misunderstands the nature of a constitution. Words have meaning, and when the Constitution was signed, the meaning of *those* words, at that time, was agreed to and became authoritative, not the words or meanings or interpretations of any other period. As a hypothetical example, if the Founding Generation had ratified an amendment that prevented “furniture” from being bought and sold, in which “furniture” at the time referred only to chairs, then the Constitution would not prohibit the buying and selling of tables, even if “table” became part of the definition of “furniture” in 1900 or 2023. “Tables” were not referenced in the amendment when it was ratified and, therefore, never written into law. Claiming otherwise would bypass the Constitution's constraints by allowing words to be redefined when most convenient. Furthermore, the Constitution was agreed to by a *supermajority* of the people, not a simple majority (McGinnis and Rappaport 28-29). It is true that subsequent generations did not agree to the words and meanings of the Constitution at the time of its ratification, but in anticipation of

changing circumstances, the Framers included an amendment provision (Constitution of the United States, art. V). If the American people want to prohibit the buying and selling of tables under the definition of “furniture,” they will have to pass a constitutional amendment enshrining that definition into law.

Furthermore, even if it is the case that judicial interpretation does not *need* to be tied to the year 1787, in the sense that interpreting the Constitution according to its meaning in, for instance, 1900 would also “constrain interpretation,” 1787 has a more tangible connection to the Constitution itself, making it less of an arbitrary line. Ultimately, those who criticize originalism based on the “dead-hand” argument must contend with the “counter-majoritarian difficulty,” the idea that it is undemocratic for unelected judges to change the meaning of the Constitution over the will of the majority (Farber and Siegel 60). In other words, if the meaning of the Constitution should not be tied to 1787 or should evolve over time, then the question becomes why judges should be the ones to decide. All these debates and concerns are valid and demonstrate that there are no easy answers. Originalism simply presents one method for navigating these considerations.

Over time, there have been multiple variations or branches of originalism. The two most prominent are original intent originalism and original public meaning originalism. Original intent originalism was the first major branch of originalism, which posited that the Constitution should be interpreted in light of the subjective intentions of the Framers of the relevant constitutional provisions (Barnett, “An Originalism for Nonoriginalists” 611-612). Original public meaning originalism proposes that original meaning should be determined based on how the provision would have been understood by a “reasonable, well-informed observer at the time the provision was ratified” (Iyer 69). Under this approach, the intent or expectations of the Ratifiers may be

relevant for understanding the public meaning of a constitutional provision, but it is not authoritative in and of itself (Iyer 69).

Original public meaning originalism is now the dominant branch for several reasons. First, it is impossible to gain full access to the minds of those who ratified constitutional provisions (Farber 1087-1088). There are many issues that the Framers never explicitly discussed (Farber 1088). Moreover, even when there *is* explicit information in the legislative history, it is still unclear whether the information was meant to be included as part of understanding the law's text or whether it was extraneous information. Therefore, gauging the Ratifiers' intent can become a guessing game. Second, it is challenging to aggregate the Ratifiers' intentions to glean a consensus (Farber and Siegel 66). In this sense, it is arguable that there is no such thing as the "intent of the Framers." Laws are complex and multilayered, and the reasons why one legislator voted for a law are likely different from other legislators. Thus, if one coherent "original intent" is impossible to ascertain, then original intent originalism is an impossible standard to employ consistently, even if one could identify the actual reasons why laws and amendments were passed. Third, the Constitution is authoritative because it was ratified by the *people*, not because of the greatness of the Founding Fathers or their debates (Whittington, "Originalism" 381). The Constitution did not become authoritative during the Constitutional Convention. It became authoritative as soon as the people within each state agreed to be bound by it. Therefore, by looking at what the words of the Constitution meant when the people ratified it, original public meaning originalism better reflects what was *truly* agreed upon by the people who agreed to it. Original public meaning originalism is hence a much better reflection of the public authority of the constitutional text.

IV. Originalism and Precedent

Although all judges adhere to at least some precedents, there are significant debates among originalist scholars as to how originalism and precedent should work together, especially when the precedent was decided in contradiction to the original meaning of the Constitution. Thomas Merrill claims that “[t]o a large extent, originalism and precedent reside in parallel universes that do not intersect” (“The Conservative Case” 977).

First, there is a question of whether adhering to precedent is constitutional. Many originalist scholars argue that Article III of the Constitution, which vests judicial power in the judiciary, incorporates at least some precedent (McGinnis and Rappaport 21; Strang, “An Originalist Theory of Precedent: The Privileged Place” 1732). For example, scholars John B. McGinnis and Michael B. Rappaport argue that the Framers understood “judicial power” to include a minimal notion of precedent because it has long-standing roots in Anglo-American law, it was expected to play a role in the constitutional system, and it was a central component of judicial decision-making at that time across all issue areas (21-23). They do not believe that precedent determines or replaces original meaning, only that precedent has an originalist basis and that a refusal to adhere to any precedent is unconstitutional (McGinnis and Rappaport 27). Thomas Merrill also offers practical justifications for his presumption in favor of adhering to precedent. He believes that (1) the Constitution is cryptic and must be supplemented with other sources of law, which is more fulfilled by precedent than originalist sources, (2) precedent is significantly more accessible than originalist sources, (3) the skill sets of American lawyers and judges are more suited to examine case law than the kinds of historical materials necessary to conduct an originalist inquiry, (4) such a system promotes a selection process that values judges’

legal competence over their ideological affiliation (Merrill, “The Conservative Case” 980-981), and (5) such a system encourages judicial restraint (Merrill, “Originalism” 273).

However, other scholars disagree. For example, Michael Paulsen asserts that “[w]hatever one’s theory of constitutional interpretation, a theory of *stare decisis*, poured on top and mixed in with it, *always corrupts the original theory*” (289) and therefore “[s]*tare decisis* is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution!” (291). The basic premise that led him to his conclusion is similar to Gary Lawson’s. Lawson argues that the Constitution creates a *prima facie* case against precedent in the Supremacy Clause (6, 14). The Supremacy Clause announces that, in cases of conflict, the Constitution, along with federal statutes and treaties, takes precedence (Lawson 6).² As this list does not include past judicial decisions, if precedent is inconsistent with the Constitution’s original meaning, it must be struck down. Furthermore, there are no constitutional provisions that command courts to give weight to precedent, and precedent was not so entrenched during ratification that it can conclusively be included in the Constitution’s granting of “judicial power” such that it would overcome the Constitution’s original meaning (Lawson 11-12).

Randy Barnett offers a structural argument against precedent’s compatibility with originalism. He reasons that if precedent can overcome the original meaning of the Constitution, then the Supreme Court is no longer truly bound by the Constitution but is instead making its own determinations about what the Constitution means—a reversal of the intended relationship between the judiciary and the Constitution (“Trumping Precedent” 259).

² “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” (*Constitution of the United States*, art. VI).

Nevertheless, assuming precedent does have an originalist basis and should (at least) sometimes be adhered to, originalists must grapple with when to do so. Paulsen, Lawson, and Barnett believe that originalism should trump precedent in almost all cases. Lawson concedes that precedent may be applicable when there is reason to believe that the precedent is evidence of the correct answer (4). Notably, this seemingly contradicts Schauer's definition of precedent—the adherence to a decision *regardless* of whether one is convinced by the precedent's reasoning. Thus, although Lawson claims that his position that precedent should “never” trump originalism has changed to “mostly never” (3-4), in reality, his position evidently remains “never.”

Randy Barnett believes that originalism must be followed when “a *determinate* original meaning can be ascertained” (emphasis added) but concedes that there are instances in which adherence to precedent may not be inconsistent with original public meaning originalism (“Trumping Precedent” 269). First, in nonconstitutional cases (and many constitutional cases) where the original public meaning of the text is irrelevant (263). Second, in cases where a judicial construction is consistent (or at least not inconsistent) with the text's original meaning and is just as constitutionally legitimate (265). Third, in certain situations where identifiable citizens have reasonably relied on erroneous precedent, as long as those claims are appropriately tailored and not overly misapplied (266). Fourth, in cases where there are epistemic uncertainties regarding whether originalist claims are correct (267). And fifth, when the text itself is inherently ambiguous (when the original meaning is *indeterminate*, or has two or more possible meanings [267-269]). Despite these exceptions, Barnett's argument still retains a very weak notion of precedent and aligns quite well with Lawson's and Paulsen's theories.

For those originalists who believe that some precedent is acceptable or necessary to accept, some favor weaker theories than others. For example, Lee Strang, John McGinnis, and

Michael B. Rappaport adhere to a weaker notion of precedent. In particular, Strang distinguishes between originalist and nonoriginalist precedents, both of which he believes are owed some respect (“An Originalist Theory of Precedent: Originalism”; “An Originalist Theory of Precedent: The Privileged Place”). His “Interpretive and Constructive Approaches” posit that originalist precedent—precedent that makes a good faith effort to incorporate and apply original meaning—is binding when the presumption in its favor is not contested and when original meaning is indeterminate (metaphysically or epistemically [Strang, “An Originalist Theory of Precedent: The Privileged Place” 1748, 1755-1765]).

Strang also believes originalism is grounded in the Aristotelian tradition (“An Originalist Theory of Precedent: Originalism” 437) and therefore argues that upholding nonoriginalist precedent can be consistent with originalism when it effectively promotes the common good (420). This position is somewhat similar to McGinnis and Rappaport, who believe in adhering to precedent when it produces a net benefit (2). All three scholars would consider how the reasoning and outcome of the precedent compare to the original meaning (McGinnis and Rappaport 41, 43; Strang, “An Originalist Theory of Precedent: Originalism” 473); the costs of overruling the precedent, including on Rule of Law interests (e.g., stability, reliance interests, and workability [McGinnis and Rappaport 45; Strang, “An Originalist Theory of Precedent Originalism” 474-475]); and how deeply embedded the precedent is in the constitutional system (McGinnis and Rappaport 35; Strang, “An Originalist Theory of Precedent: Originalism” 481). They would also consider whether the precedent is fixing something within the constitutional system. For McGinnis and Rappaport, this includes super majoritarian failures (40). For Strang, it includes the nonlegal justness of the precedent, or “the characteristic of a precedent to rightly order the relationships of persons and institutions even though the judicial act of ordering—the

announcement of the precedent—was itself illegal because it was not in accord with the governing law” (“An Originalist Theory of Precedent: Originalism” 477). Finally, McGinnis & Rappaport would consider whether the precedent was created contrary to the rules of precedent (42-43).

Finally, some scholars believe that precedent should be followed in most cases or that there is a stronger presumption in favor of upholding precedent. Henry Paul Monaghan argues that the Court has strayed far from originalism in many areas of constitutional jurisprudence, but these decisions are now entrenched in the constitutional order (723). He believes that “[t]he Supreme Court is concerned not with the Constitution, but with constitutional law, which consists largely (albeit not entirely) of case law” (Monaghan 771). Given this reality, both he and Thomas Merrill conclude that a more robust theory of precedent—defined by Merrill as “regarding prior judgments as legally binding and subject to overruling only on a showing of some special justification beyond mere error”—is preferable to a weaker theory of precedent—defined by Merrill as “regarding prior judgments as presumptively correct but subject to overruling based on a demonstration of error” (“Originalism” 272).

Even with their strong(er) presumption in favor of precedent, neither Merrill nor Monaghan believes that precedent should always be upheld. Merrill, for example, would consider how unworkable the precedent is and whether it conflicts with other precedents (“Originalism” 272). Like Lee, McGinnis, and Rappaport, Monaghan would consider whether precedent advances stability and continuity better than adherence to a decision based on the Constitution’s original meaning (772). Monaghan is also amenable to overturning precedents with “significantly harmful” effects and maintaining precedents that are not producing harmful effects, especially those in which *departing* from precedent would *create* significantly harmful

effects (760). *Brown v. Board of Education* is an example in which departing from precedent (*Plessy v. Ferguson*) was the correct decision because of the significantly harmful effects of racial segregation. Furthermore, “it seems doubtful that stare decisis is ever properly invoked to bar the claims of any group prevented from constructing the political and social rules of which they complain” (Monaghan 761). Monaghan admits, however, that it is likely impossible to create determinate criteria to conclusively determine what is considered “significantly harmful” because each case has a unique set of facts, circumstances, and context (761-762).

Monaghan also argues that doctrinal inconsistency is sometimes tolerable if it is “in the name of larger interests” (such as compromise), especially because the precedential value of rules and standards is not necessarily equivalent to the precedential value of the reasoning behind those rules (759). He suggests, for example, that even if *Roe v. Wade*’s ruling is maintained, its reasoning does not need to be extended (759). Finally, Monaghan contends that the Court cannot simply adhere to precedent because it is politically beneficial for the Court to ignore the issue (763). Ultimately, Monaghan’s argument does provide some nuance, though he and Merrill still are more willing to uphold precedent than many other originalists.

These scholars represent a few of the many ways originalists have conceptualized precedent’s role (or lack thereof) within originalism. However, even when there is agreement among scholars as to the relevant criteria, there are still variations within those criteria. For instance, many of these scholars believe that certain reliance interests may weigh in favor of upholding precedent. However, Barnett believes reliance interests must be much more narrowly tailored than other scholars. Therefore, it is essential to consider the criteria and the threshold each scholar requires for each criterion. All these scholars’ positions and arguments are much more nuanced and complex than can be represented here, but the important takeaway is that there

is no one “right way” to think about precedent as an originalist. There are, however, a variety of considerations that originalists, judges, and scholars must weigh when deciding when and how precedent will or will not trump originalism—creating a gradation of approaches.

V. The (Conservative) Originalist Justices

Although there is much to examine regarding scholarly views on precedent and originalism, the judiciary, not academia, decides constitutional cases. Therefore, the rest of this paper will focus on the self-avowed conservative originalist Justices on the Supreme Court. This includes Antonin Scalia, Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Although Justice Samuel Alito and Chief Justice John Roberts do care about the original meaning of the Constitution, they are much more prudential and supplement their jurisprudence with other considerations (Wurman; Siegel 166-167). They will thus not be the focus of this paper. However, future research should consider the similarities and differences regarding adherence to precedent between these prudential, or practical, originalists and the other self-avowed originalists across different cases and issue areas. The differences in judicial philosophies between these two Justices and their self-described originalist colleagues may influence how the Court decides important areas of law in the coming years, especially concerning precedent. Before examining the potential implications of the similarities and differences between the originalist Justices on precedent, it is crucial to understand what the similarities and differences are in their approaches to *stare decisis*.

A. Introductions

1. Justice Scalia

Justice Antonin Scalia was nominated by President Ronald Reagan to the Supreme Court and confirmed in 1986 after serving on the United States Court of Appeals for the District of Columbia Circuit (“Antonin Scalia”). He passed away at seventy-nine in 2016, leaving a remarkable legacy (“How Antonin Scalia Changed America”). As a staunch defender of originalism, Justice Scalia was highly influential in originalism’s growth in respectability and acceptance (“How Antonin Scalia Changed America”; Strang, “The Most Faithful Originalist” 874). He was also a textualist, believing that judges should begin with the text and are bound where the text is clear (Scalia and Breyer 48:18-48:40). However, where the text is unclear, he argued that there must be a historical inquiry into the original meaning to understand what the people agreed to when they ratified that provision of the Constitution (Scalia and Breyer 47:30-48:24, 52:03-53:20). More specifically, Justice Scalia was a public meaning originalist and therefore believed that in interpreting the Constitution, his role was to look at what the words meant to reasonable citizens at the time those words were written and ratified (Scalia and Garner 78-92). He argued that if the meaning of the words in the Constitution evolves, then there are, in effect, no limitations on the current society except “to thine own self be true” (Scalia, “Legally Speaking” 13:10-13:54). Justice Scalia acknowledged that originalism is not perfect (Scalia, “Legally Speaking” 18:52-19:02), but nonetheless believed that it was the lesser of two evils (compared to nonoriginalist approaches) and is more in line with the nature and purpose of the Constitution (Scalia, “Originalism”).

While a firm believer in originalism and textualism, Justice Scalia clearly and explicitly stated that “any legal philosophy, whatever it is, has to make an exception for *stare decisis*. You cannot reinvent the wheel” (Scalia, “Legally Speaking” 28:04-28:08). Justice Scalia saw *stare decisis* as a pragmatic exception to originalism and textualism, rather than a part of them, in

order to enhance the efficiency and functionality of the Court (Scalia, *A Matter* 140). He wrote that without *stare decisis*, courts would only be resolving the current issue before them rather than expounding a stable and substantial body of law (Scalia, *A Matter* 7-9). He also believed that *stare decisis* helps protect reliance interests and promotes certainty and stability (Scalia, Concurring opinion, *Walton v. Arizona* 673).

Furthermore, Justice Scalia rejected the notion that it is inherently wrong for originalists to accept *stare decisis*, arguing that

[t]he whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability. It is a compromise of all philosophies of interpretation, his no less than mine...[t]he demand that originalists alone ‘be true to their lights’ and forswear *stare decisis* is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance. (*A Matter* 139)

However, he did not accept *stare decisis* in all cases. In fact, in *Lawrence v. Texas*, he stated that he did not believe himself to be a rigid adherent to *stare decisis* (587). For example, in his *Rutan v. Republican Party* dissent, he remarked that if the precedent is erroneous, recent, contradicted by tradition, and unworkable in practice, it should not be upheld (Scalia, Dissenting opinion, *Rutan v. Republican Party of Illinois* 110-111).

2. Justice Thomas

Justice Clarence Thomas joined the Supreme Court in 1991 as a President Bush nominee after serving as a Judge on the United States Court of Appeals for the District of Columbia Circuit (“Current Members”). Justice Thomas credits much of his thinking to the parochial

schools he attended, which emphasized honesty and integrity (Thomas, “A Conversation” 22:09-22:19). He has thus expressed that he does not spend most of his time trying to determine the exact right approach to interpretation (Thomas, “Justice Clarence Thomas: Personal reflections” 16:00-17:58). Instead, he is more concerned with searching for the right answer—not as an activist, but as a judge (Thomas, “Justice Clarence Thomas visits HLS” 36:23-37:04).

Justice Thomas believes originalism to be legitimate, impartial, and necessary (Thomas, “2008 Wriston Lecture”). Iyer argues that Justice Thomas has incorporated both original intentions and original public meaning into his jurisprudence (74). In his *McDonald v. Chicago* concurring opinion, for example, Justice Thomas explicitly stated that “[w]hen interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted” (25), although he has been more willing than Justice Scalia to look to original intentions as an authoritative source (Iyer 75-76).³

Justice Thomas also embraces a version of originalism that considers the underlying values in the Declaration of Independence and natural law as part of his interpretive methodology (Hayward). This stands in contrast to Justice Scalia, who refused to do so, despite personally believing in natural law, stating, “I have been appointed to apply the Constitution and positive law. God applies the natural law” (Scalia, “The Common Christian Good”).

Justice Thomas is also unlike many other judges in that he is considered to be a Justice who cares much less about adherence to precedent, explicitly stating that “[a]s an initial matter, where the Court has wrongly decided a constitutional question, the force of *stare decisis* is at its weakest” (Dissenting opinion, *Harris v. United States* 10). Using the analogy of a freight train, Justice Thomas argues that before adding another car to the train, there is a responsibility to

³ Iyer argues that further research is needed to determine whether Justice Thomas’s clarification that he is an original public meaning originalist has borne out in his jurisprudence since *McDonald v. Chicago* (75-76).

check the other cars, to check who is driving, to check the engine, and to determine where the train is going. Otherwise, one is simply adding another car without considering whether the train is heading in the right direction (Thomas, “Justice Clarence Thomas: Personal reflections” 21:53-23:33). He echoed this in *McDonald*, stating that:

I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of our Nation’s legal system. But *stare decisis* is only an ‘adjunct’ of our duty as judges to decide by our best lights what the Constitution means. It is not ‘an inexorable command.’ (qtd. in *Lawrence v. Texas* 577) Moreover, as judges, we interpret the Constitution one case or controversy at a time. The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here. (8)

Nevertheless, in footnote six of his *Gamble v. United States* concurrence, Justice Thomas explicitly stated that he does not believe that the Court must recheck every precedent in every case (11). Still, he is more amenable to overruling precedent than other Justices, especially if a party to the case asks the Court (Thomas, Concurring opinion, *Gamble v. United States* 11n6). He believes the Court’s job is to justify and explain its rationale, not just rotely cite cases as evidence (Thomas, “Justice Clarence Thomas: Personal reflections” 11:37-12:27).

In *Gamble v. United States*, Justice Thomas justified his view of *stare decisis* via three avenues. The first is by an originalist understanding of Article III. As previously mentioned, some originalist scholars argue that the “judicial Power” vested in the judiciary requires at least some respect for precedent. Justice Thomas, however, believes that the original public meaning

of “judicial power” is for the Court to faithfully interpret the Constitution and valid law, not to develop or alter it (37-38). Second, the Supremacy Clause has made the U.S. Constitution, federal law, and treaties the supreme law (Constitution of the United States, art. VI). According to Justice Thomas, neither the Supremacy Clause nor any other part of the Constitution mandates adherence to precedent (43). This understanding of the Supremacy Clause impacts his interpretation of Article III: if the Constitution is supreme, then precedent that conflicts with it cannot stand (43-44).

Third, there is a distinction between the English common law system and the United States federal system, which has significant implications for *stare decisis* (39). In the English common law system, *stare decisis* is extremely important because there is no body of written law to interpret, only past judicial decisions to rely on (39). However, even in this system, English judges did not apply precedents that very clearly contradicted reason, divine law, or were very absurd or unjust (40). In contrast, the U.S. federal system has a body of written laws (the Constitution, federal statutes, federal rules and regulations, and federal treaties [41-42]). Therefore, the American legal system allows and requires the interpretation of the objective meaning of those written laws. This shifts the emphasis from judicial decisions to objective interpretations of the law (42).

Justice Thomas additionally responded, in his *Gamble* opinion, to the many arguments about the desirable effects of precedent (including predictability, consistency, integrity, reliance interests, judicial integrity, and humility). He argued that they are not enough to overcome the fundamental law of the United States, and they are often illusory, pushing arbitrary policy-driven adjustments to suit the majority’s needs (49). In fact, he believes there would be less certainty

and greater stability if malleable balancing tests were replaced with clear, principled rules based on the text of the law (50).

3. *Justice Gorsuch*

Justice Neil Gorsuch joined the Supreme Court in 2017 as a President Trump appointee to replace Justice Antonin Scalia (“Neil Gorsuch”). Before his appointment and confirmation, Justice Gorsuch served on the United States Court of Appeals for the Tenth Circuit (Kendall).

Justice Gorsuch is a textualist and an original public meaning originalist, just like his predecessor, although Max Alderman and Duncan Pickard contend that he has been willing to consult sources that Justice Scalia would not (185). Justice Gorsuch asserts that originalism means that a judge should honor the words on the page as they were originally understood and apply them as best he or she can to contemporary circumstances. Now when we talk about any other written law, that’s exactly what judges all agree they’re supposed to do...and I ask you why shouldn’t the same be true of our written Constitution? Our Founding Fathers rejected an unwritten constitution that might evolve. They knew that example. That was England. They said there are certain things that bear writing down and holding fast to forever. There aren’t very many, the Constitution’s short. But those few things are vital, and should never be taken away, and should never be supplanted except for by ‘We the People.’ Those are the first three words of our Constitution. Not we the judges, not we in Washington, not we the bureaucrats, not we the States. We the People. So originalism, I think, honors the writtenness of our Constitution. (Gorsuch, “An Evening” 41:50-43:12)

Justice Gorsuch believes that ignoring the original meaning of the text results in less liberty and fewer rights, in addition to blurring the line between legislators and judges—the former of which

can decide issues based on their moral convictions or based on political and policy consequences (Gorsuch, “2016 Sumner Canary Memorial Lecture” 906).

Alderman and Pickard argue that during Justice (then-Judge) Gorsuch’s time on the Tenth Circuit, he was willing to uphold horizontal *stare decisis* (190). In his book, *A Republic, if You Can Keep It*, Justice Gorsuch quoted Jerome Frank, a critic of precedent who stated, “no sensible person suggests that *stare decisis* be abandoned” (220). Justice Gorsuch also suggested that “[p]erhaps some degree of respect for precedent may be required for federal courts to exercise the ‘judicial Power’ endowed by Article III, or to comply with other constitutional commands like due process,” referencing William Blackstone’s work, *The Federalist*, and Justice Joseph’s Story’s *Commentaries on the Constitution* (Gorsuch, *A Republic* 216). Still, Justice Gorsuch has also stated that precedent is not a doctrine that is absolute in its authority—it can be distinguished and overruled (Gorsuch, *A Republic* 216).

4. Justice Kavanaugh

Justice Brett Kavanaugh joined the Supreme Court in 2018 as a President Trump nominee after serving on the United States Court of Appeals for the District of Columbia Circuit (“The Current Court”). He identifies as a textualist, although he also considers original public meaning originalism important in constitutional interpretation, alongside history, tradition, and precedent (Kavanaugh, “CONFIRMATION HEARING” 195). To him, the precise words of the Constitution matter and are controlling, even two centuries later, because the Constitution is the superior law of the United States (Kavanaugh, “Our Anchor” 1913-1914 and “CONFIRMATION HEARING” 389).

Justice Kavanaugh has expressed that it is important to “try to follow precedent and have a stable body of precedent” (Kavanaugh, “The Judge” 692). During his confirmation hearings, he

insisted that the Judicial Power Clause of Article III includes precedent (as also articulated by Federalist 78) and that “[y]es. I pay attention to the text, the original public meaning. But informed, I always want to make sure I say precedent. If you are in a constitutional case, precedent is critically important, and that is part of the text of the Constitution, too” (Kavanaugh, “CONFIRMATION HEARING” 296 and Concurring opinion, *Ramos v. Louisiana* 2).

5. *Justice Barrett*

Justice Amy Coney Barrett joined the Supreme Court in 2020 as a President Trump nominee. Before that, she was a Notre Dame Law School professor before joining the United States Court of Appeals for the Seventh Circuit in 2017 (Wager). She also clerked for Justice Scalia, whom she considered a mentor (Barrett, “2019 Sumner Canary Memorial Lecture” 855).

Justice Barrett has explicitly stated that she shares Justice Scalia’s approach to text and that as an originalist (or more specifically, as an original public meaning originalist), it is her job to adhere to the original meaning of the law as it is not a judge’s duty to decide cases based on personal preferences or public opinions (Barrett, “Reflections” 10:00-11:38; Barrett and Nagle 3, 5-9). She believes

we agree to live by the Constitution until it’s lawfully changed. And judges can’t change it. That’s not democratic, right? We change it by the prescribed process, which is Article V. Now, the Constitution doesn’t answer every question. And it gives a lot of flexibility. It gives that flexibility to democratic majorities to meet changing times by passing legislation. The Constitution isn’t the panacea that cures every societal problem. We have to trust our political branches to do that. (Barrett, “Reflections” 35:56-36:32)

More specifically, she argues that originalism is not about how cases *should* be decided but rather a claim about what law is and what *must* be observed (Barrett and Nagle 9). Regarding her

views on *stare decisis*, Justice Barrett has not yet, in a Supreme Court opinion, explicitly listed the criteria she would take into consideration. However, her academic scholarship and statements during her confirmation hearings offer insights into how she views horizontal *stare decisis* at the Supreme Court level.

From a theoretical standpoint, Justice Barrett believes that originalism is a “quintessentially precedent-based theory,” though she is not referring to *judicially based* precedents (“Originalism” 1922). Originalism looks at historical sources that provide context as to the original meaning of the Constitution, which controls present interpretations (Barrett, “Originalism” 1923). She also believes that various features, factors, and rules within the judicial system, apart from *stare decisis*, promote stability (Barrett, “Originalism” 1929-1930). For example, Justices do not have to reconsider precedents that litigants do not ask to be reconsidered (“agenda control” [Barrett, “Originalism” 1930, 1942]). Justices may still choose to but are less likely to do so when very contentious or divisive precedents are involved (Barrett, “Originalism” 1929-1930). This is why she does not believe that “super precedents” are doctrinal or should be inherently given greater deference. These precedents are called “super precedents” because they are so entrenched in the constitutional order that they are not brought to the Court’s attention for reconsideration (Barrett and Nagle 16-23). Accordingly, she does not believe that *Roe v. Wade* is a super precedent (Barrett, “Nomination” 4) and ultimately believes that the criticism of originalism based on *stare decisis* is overstated (Barrett, “Originalism” 2; Barrett and Nagle 22).

When precedent is on the Court’s agenda, Justice Barrett has argued in her academic writings that, what she calls, a weak presumption of *stare decisis* may be desirable (and inevitable [Barrett, “Precedent” 1715])—although it is not clear that what she means by a “weak

presumption” is what is meant by the “weaker” theories of *stare decisis* put forward by other scholars such as Rapport and McGinnis or Strang. She believes that a weak presumption is desirable because it still promotes doctrinal stability (Barrett, “Precedent” 1712), in the sense that it requires justification to overrule it, but it also prevents permanent, fundamental changes in constitutional law and prevents the Constitution from becoming whatever the Court wants it to be. It is also ideal for a pluralistic Court and a pluralistic society (Barrett, “Precedent” 1722-1723).

B. The Justices’ Criteria for Overruling *Stare Decisis*

Table 1: A Summary of the Justices’ *Stare Decisis* Consideration

Justice Scalia	Justice Gorsuch	Justice Kavanaugh	Justice Barrett	Justice Thomas
The erroneousness of the precedent				
Reliance Interests				
A. The precedent is a rule of property				
Workability				
How entrenched the precedent is in the constitutional system				
A. The precedent is generally accepted				
B. The precedent has not been undermined by subsequent facts and law				
C. The circumstances have largely not changed				
D. The precedent is <u>not</u> an isolated decision				
E. Antiquity of the precedent				

Scholars spend significantly more time researching and developing their theories than Justices, who often use simpler methodological tools. As a result, there are many similarities between these Justices. However, one significant divide is between Justice Thomas, who takes a more principled approach, and the others, who take a more pragmatic approach.

In *Gamble v. United States*, Justice Thomas expressly rejected Justice Scalia's formulation of *stare decisis* in *Montejo v. Louisiana*, which included examining the workability, antiquity, reliance interests, and the reasoning of the precedent in question (Thomas, Concurring opinion, *Gamble v. United States* 3-4; *Montejo v. Louisiana* 792-793). Justice Thomas believes that this view places the Court's personal preferences above the law, in which the Court is exercising "Force" and "Will," the powers of the other two political branches.⁴

Justice Thomas's view aligns well with Lawson, Barnett, and Paulsen in that, in most (if not all) cases, Justice Thomas prioritizes the original meaning of the Constitution above precedent. He specifically argues that "...if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other facts support overruling the precedent" (Thomas, Concurring opinion, *Gamble v. United States* 8-9). Ultimately, he believes that no special justification is needed and that "our role of upholding the law's original meaning is reason enough to correct course" (11).

Justice Thomas also suggested in *Gamble* that when the precedent is not demonstrably erroneous, meaning that the case is decided within a permissible range of interpretations, the Court may, but is not required to, overrule it because reasonable people can disagree about the original meaning. It is only an impermissible interpretation that the Court is required to overrule

⁴ See also Federalist 78.

(11-12). For example, Justice Thomas is well known for his distaste for substantive due process and his desire to overturn it. In *United States v. Lopez*, Justice Thomas wrote a concurring opinion criticizing the Court's Commerce Clause jurisprudence as having strayed from the original meaning of the Commerce Clause. Nonetheless, he did not call for a complete overturning of the Court's entire jurisprudence on the matter; instead, he only sought reconsideration of future Commerce Clause cases (584-585). To justify his willingness to overturn substantive due process but not the entirety of the Court's Commerce Clause jurisprudence, Justice Thomas reasoned in footnote nine of his concurrence that

[u]nlike *Lochner* and our more recent 'substantive due process' cases, today's decision enforces only the Constitution and not 'judicial policy judgments'...Our invalidation of the Gun-Free School Zones Act therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself...As John Marshall put it: 'If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard They would declare it void.' (601)

This statement suggests that Justice Thomas is more inclined to overturn precedent when he believes it involves doctrines entirely outside the scope of judicial interpretation. However, he is more willing to uphold it (on the condition of greater temperance in the future) when the doctrine or precedent falls within a proper judicial role.

The other Justices agree that the erroneousness of the precedent is an essential factor (if not the most essential), which includes considerations of the quality of the precedent and how well-reasoned it is (Barrett, "Amy" 37:26 Garner et al. 397, 398-399; Scalia and Garner 412;

Montejo v. Louisiana 793).⁵ However, that is where the agreement with Justice Thomas ends. The other originalist Justices believe that more than erroneousness is required.

All the originalist Justices, explicitly or implicitly, believe that there must be an analysis of the costs and potentially harmful effects of overruling a precedent compared to the costs and potentially harmful effects of upholding it. More specifically, courts must consider the specific reliance interests at stake (although a cost-benefit analysis is intertwined with the other factors as well [Barrett “Amy” 1:36:27; Garner et al. 388-389; Kavanaugh, Concurring opinion, *Ramos v. Louisiana* 8; *Montejo v. Louisiana* 792]), which courts generally view as a crucial criterion (Garner et al. 296). For example, Justice Barrett considers reliance interests to be “paramount” (Barrett, “Precedent” 1730). Moreover, property and contract rights often garner heightened consideration because of the strong reliance interests they create, which can also implicate due process (Barrett “Stare Decisis” 1020; Garner et al. 407-408). Justices Gorsuch’s and Kavanaugh’s book, *The Law of Judicial Precedent*, qualifies this, however: “before weighing this question, the judges should also consider whether they are acting within the law or displacing the legislature” (388-389). This factor is also connected to another factor the Justices consider—the precedent’s workability. Workability refers to how difficult a precedent is or has been to apply (Garner et al. 399). Justice Scalia assessed whether a precedent required the Court to act as legislators rather than judges (Scalia and Garner 412).

A fourth consideration might be phrased as how “entrenched” the precedent is. This includes the extent to which the precedent has been accepted by society, whether the precedent

⁵ *The Law of Judicial Precedent* is a book co-authored by Justices Gorsuch and Kavanaugh alongside Bryan A. Garner and several others. Although the book does not list what Justice Gorsuch and Justice Kavanaugh would personally consider, the book includes traditional and historical criteria for determining whether to overrule or uphold precedent. Furthermore, during his confirmation hearings, Justice Gorsuch stated that the book “...articulates how a good judge goes about assessing the law of precedent in any case” (202). It thus provides clues as to how both Justices view precedent.

has been undermined by subsequent facts and laws, whether the circumstances have changed, whether the precedent is part of well-settled principles of law, and whether the precedent was an isolated decision (Garner et al. 396, 404; Scalia and Garner 412). For Justices Gorsuch and Kavanaugh, this would also include examining whether the court was divided as well as the strength of the reasons for that division (which is even more important [Garner et al. 399]). The precedent's antiquity (another factor the Justices generally agree on) can also be placed in this category (Garner et al. 405; Kavanaugh, Concurring opinion, *Ramos v. Louisiana* 8; *Montejo v. Louisiana* 792).

Many of these factors are theoretically distinct but practically interconnected. For example, how workable a precedent is or whether it is isolated may impact the kinds of reliance interests at stake. Nonetheless, these factors should still be seen as distinct because their interrelatedness will depend on the particular facts and circumstances of the case before the Court. A precedent may be isolated in that only a small number of individuals are impacted by it, but those individuals may nonetheless have strong reliance interests. Alternatively, a precedent may pose workability problems but not be egregiously wrong. Therefore, separating these criteria still makes sense in the discussion on *stare decisis*. Still, because these factors cannot be entirely separated, how each judge weighs these factors will be different (Scalia and Garner 412-413).

Finally, a special note should be made about Justice Barrett. She has not explicitly listed the criteria she uses, and she has stated in her academic writings that she does not believe in "super precedent" as a doctrinal term, defining it narrowly as a precedent that would not be brought before the Court's agenda for reconsideration in the first place (Barrett and Nagle 16-17). This belief may suggest that there are nuances in her approach to *stare decisis* that are

significantly different from the other Justices. For example, the precedent's antiquity may be less significant of a factor, given her views about "super precedents." However, during her confirmation hearings, she stated that she would follow the Court's traditional *stare decisis* criteria, including reliance interests, the workability of the precedent, whether it has been undermined by subsequent facts and law, and so forth (Barrett, "Amy" 37:26). She would, in essence, compare the costs of overturning precedent with the benefits of correcting a doctrinal error (Barrett "Precedent" 1716). Given that the antiquity of a precedent is arguably connected to some of these other factors and given the other Justices' agreement on the other factors listed, Justice Barrett can reasonably be put in the same camp as Justice Scalia, Justice Gorsuch, and Justice Kavanaugh with regards to their views on *stare decisis*.

In comparison to originalist scholars, these four Justices fall somewhere along the spectrum between the weaker theories of precedent and the stronger ones, although it is difficult to determine precisely where they land. They likely, however, fall closer to the weak(er) theories of precedent, similar to the views of Strang, McGinnis, and Rappaport, given Justice Scalia's consistent calls to overrule *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, as well the recent decision in *Dobbs v. Jackson Women's Health Organization* in which all the other originalist Justices voted to overrule *Roe* and *Casey*. However, while Justice Gorsuch and Justice Kavanaugh agree with McGinnis and Rappaport that Article III likely incorporates at least some precedent in its granting of "judicial Power" (Gorsuch, *A Republic* 216; Kavanaugh, Concurring opinion, *Ramos v. Louisiana* 2), Justice Scalia saw it as a "pragmatic exception" to his originalist philosophy (Scalia, *A Matter* 140). Justice Barrett agrees with Justice Scalia, calling it "a judge-made doctrine that federal courts have given varied force

in varied contexts” (Barrett, “Precedent” 1713). The difference in belief in how precedent is justified may or may not influence which precedents the Justices are willing to overrule.

Regardless, the following analyses will focus on the Justices’ views of precedent instead of scholars’, although there is overlap (most notably, reliance interests). The subsequent section will examine substantive due process and the Court’s decision to overrule *Roe* and *Casey* in *Dobbs*. Afterward, the paper will discuss how the *Dobbs* Court’s application of *stare decisis*, in that case, might have implications for other substantive due process precedents—namely rights related to sexuality, same-sex marriage, and contraception.

VI. The Application of *Stare Decisis* in Substantive Due Process

Cases

A. Introduction

One of the most contentious areas of constitutional jurisprudence is substantive due process, which has protected various rights ranging from contraception to abortion to same-sex marriage (Farber and Siegel 377). It has become an even more salient issue in light of *Dobbs v. Jackson Women’s Health Organization*, which overruled the controversial abortion cases *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The decision has also sparked questions about how other substantive due process precedents will be impacted. The following section will analyze the *Dobbs* decision and the key takeaways related to *stare decisis*. *Dobbs* will be the starting point for exploring whether other substantive due process precedents are also likely to be overruled if *stare decisis* is applied in a consistent manner.

B. Substantive Due Process

Due process appears in both the Fifth Amendment, ratified with the original Bill of Rights in 1791, as well as the Fourteenth Amendment, ratified in 1868 as part of the post-Reconstruction Amendments (Constitution of the United States, amend. 5, amend. 14; “14th Amendment to the U.S Constitution;” United States Census Bureau). These amendments prevent the federal and state governments, respectively, from depriving a person of “life, liberty, or property, without due process of law” (Constitution of the United States, amend. 5, amend. 14 sec. 1). The natural and literal interpretation of the due process clause is related to *process*, meaning that individuals have the right to procedural protections from the government’s deprivation of life, liberty, or property, such as the right to be heard before an impartial and neutral mediator (“Procedural due process”). However, the Court has interpreted the Due Process Clause to also protect substantive rights. In other words, the government cannot violate certain “fundamental” rights, regardless of procedural protections, unless it meets strict scrutiny, the most stringent form of judicial review (*Reno v. Flores* 301-302).

Many argue that the first use of substantive due process was in the now-repudiated case *Dred Scott v. Sandford*, in which Chief Justice Roger B. Taney argued that congressional bans of slavery in federal territories deprived slave owners of their due process rights under the Fifth Amendment (Franck 120). However, the Court seriously began using substantive due process in economic cases in the early twentieth century to invalidate statutes that infringed on economic rights (Chemerinsky 1502-1503). This period was known as the *Lochner* era, named after the Supreme Court’s decision in *Lochner v. New York* (“Lochner era”). In *Lochner*, the Court struck down a New York law that violated the freedom of contract, which it argued was a right under the liberty provision of the Fourteenth Amendment (*Lochner v. New York*). The Court repudiated

the *Lochner* approach after 1937 when it rejected *Lochner* principles in *West Coast Hotel Co. v. Parrish*.

Eventually, the Court protected non-economic rights under substantive due process, which has become controversial (Farber and Siegel 377). The Court incorporated a majority of the guarantees, including substantive rights, found in the Bill of Rights through the Due Process Clause of the Fourteenth Amendment. However, some (most notably Justice Thomas) argue that the Privileges or Immunities Clause of the Fourteenth Amendment is the right vehicle to incorporate the Bill of Rights (Farber and Siegel 244; Thomas, Concurring opinion, *McDonald v. Chicago* 1). Some Justices have argued that incorporation is the only extent to which substantive due process applies, although substantive due process has reached well beyond incorporation in practice (Farber and Siegel 378). Substantive due process has also protected rights involving abortion, marriage, same-sex marriage, and intimate sexual conduct, including in cases concerning homosexuality, contraception, parental rights and family relationships, assisted suicide, and sterilization (Chapman and Yoshino; Farber and Siegel 379, 382-384).

C. Originalists' Beliefs About Substantive Due Process

The doctrine of substantive due process can be challenging to reconcile with originalism and textualism. As previously mentioned, the more natural textual reading of due process is that it provides *procedural* protections. Thus, many originalist scholars and judges have criticized substantive due process, though some originalists defend the doctrine (Barnett and Bernick; Bernick; Watkins). Regardless of these internal originalist debates, most, if not all, of the originalist Justices are skeptical of substantive due process as an originalist legal doctrine.

Justice Thomas is an ardent opponent of substantive due process. He does not believe substantive rights are protected through the Fourteenth Amendment, calling it “legal fiction” and

inconsistent with public understanding at the time of ratification (Thomas, Concurring opinion, *McDonald v. Chicago* 7). As stated above, Justice Thomas believes that the original meaning of the Privileges or Immunities Clause protects certain individual rights (Thomas, Concurring opinion, *McDonald v. Chicago* 19). Justice Gorsuch agrees that the Privileges or Immunities Clause is the more appropriate provision for incorporating the Bill of Rights (Gorsuch, Concurring opinion, *Timbs v. Indiana*). In his *Dobbs* concurrence, Justice Thomas left open the possibility that the Privileges or Immunities Clause protects unenumerated rights but ultimately held that “[t]he notion that a constitutional provision that guarantees only “process” before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words” (qtd. in Thomas, Concurring opinion, *McDonald v. Chicago* 7 [2]).

Justice Scalia also believed that substantive due process is absurd (Scalia, “Legally Speaking” 35:50-36:17). However, in his early years on the Supreme Court, he seemed to accept a narrow existence of protected non-textual substantive due process rights (Gorsuch, *The Future* 78). In Footnote Six of his *Michael H. v. Gerald D.* opinion, Justice Scalia asserted that the test for determining which substantive rights are protected is determined by looking at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified” (127-128). His position changed later in his tenure, potentially after *Casey* (Gorsuch, *The Future* 78). Justice Scalia explicitly stated that he did not believe substantive due process to be an originalist legal doctrine (Scalia, Concurring opinion, *McDonald v. Chicago* 1) or the Due Process Clause to protect certain liberties other than procedural protections (Scalia, Concurring opinion, *Albright v. Oliver* 275). However, he still accepted substantive due process in cases of incorporation “because it is both long established and narrowly limited” (Scalia,

Concurring opinion, *Albright v. Oliver* 275). Still, Justice Scalia was unwilling to extend substantive due process to new contexts beyond incorporation (Scalia, Dissenting opinion, *Troxel v. Granville* 92). He ultimately saw substantive due process as a way for the Courts to enshrine their preferred rights and freedoms (Scalia, “Constitutional Interpretation,” Scalia, Dissenting opinion, *Obergefell v. Hodges* 8). Justice Barrett has not explicitly articulated her views on substantive due process, though she has stated that she shares Justice Scalia’s approach to text. This suggests that her tolerance for substantive due process is also narrow, though she may be willing to accept certain substantive due process rights beyond incorporation (if the methodology for determining such rights is narrowly tailored [Barrett, “Nomination” 7]).

Justice Kavanaugh has also not clearly articulated his views on substantive due process (Nolan and Lewis 168). However, he expressed strong support for the use of the *Glucksberg* test in deciding which rights substantive due process protects (Kavanaugh, “CONFIRMATION HEARING” 213-214) because it limits “the Court’s role in the realm of social policy” and helps “to ensure that the Court operates more as a court of law and less as an institution of social policy” (Kavanaugh, “From the Bench” 16). The *Glucksberg* test is a tradition-based test to determine which unenumerated rights are protected under the Constitution (Chapman and Yoshino; *Dobbs v. Jackson Women’s Health* 12). In *Washington v. Glucksberg*, the Court stated that the right must objectively be “‘deeply rooted in this Nation’s history and tradition’” (qtd. in *Moore v. City of East Cleveland* 503) and “‘implicit in the concept of ordered liberty,’” (qtd. in *Palko v. Connecticut* 319) such that ‘neither liberty nor justice would exist if they were sacrificed’” (qtd. in *Palko v. Connecticut* 326 [721]). Justice Kavanaugh’s stated fidelity to the *Glucksberg* test suggests he may hold a similarly narrow view of substantive due process as the other Justices.

It is important to note that the *Glucksberg* test is not necessarily an originalist test. The *Glucksberg* test looks at history and tradition, which may be part of an originalist inquiry but is distinct from an examination of the original public meaning of the constitutional text. Nonetheless, it is somewhat analogous to originalism in that one of originalism's purposes is to place constraints on judicial discretion, especially given the counter-majoritarianism of the Court (Bickel 16). Similarly, the purpose of the *Glucksberg* test is to constrain the judiciary from enshrining its preferred rights and policy goals under substantive due process.⁶ Especially for the Justices who do not believe in substantive due process as a doctrine but will adhere to it because of precedent, the *Glucksberg* test may be an effective method for restraining and navigating this non-originalist doctrine.

However, it can be argued that the *Glucksberg* test has been overruled. Multiple post-*Glucksberg* cases are inconsistent with the test, including *Lawrence v. Texas* and *Obergefell v. Hodges*, which Chief Justice Roberts explicitly noted in his *Obergefell* dissent— “[i]t is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process” (Roberts, Dissenting opinion, *Obergefell v. Hodges* 19). Still, some argue that *Glucksberg* retains precedential force (Turner 216). Regardless, the conservative originalist Justices generally adhere to it and see it as an authoritative and effective means for determining which unenumerated rights are protected by the Constitution.

D. Precedent and Substantive Due Process

⁶ “The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs” (Roberts, Dissenting opinion, 22).

Regardless of which rights (if any) are truly protected under substantive due process or whether substantive due process is rooted in originalism, its modern use by the Court remains unpopular among many originalists and conservatives. The following section of this paper will focus on the tension between the Justices' originalist views on specific rights protected under substantive due process and the reality that these rights are established in the constitutional order through precedent. The paper assumes that the Justices are correct about the original meaning of the Constitution (which may or may not be true) and that the *Glucksberg* test is valid law, which allows for a comparison of the *stare decisis* factors as a separate discussion among the different cases. The following sections will examine the Court's recent decision in *Dobbs v. Jackson Women's Health Organization* before discussing whether *stare decisis* considerations, as articulated by the Justices and as applied in *Dobbs*, suggest that other substantive due process cases should likewise be overruled.

E. Abortion and the *Dobbs* Decision

1. A Very Brief History of the Court's Abortion Jurisprudence

One of the most contentious areas of law, and the one often considered to be non-originalist, is abortion (Iacono 414). The Court first protected the right to abortion in its decision in *Roe v. Wade*. The *Roe* Court held that there is a right to privacy in the Due Process Clause of the Fourteenth Amendment, which extends to a woman's right to obtain an abortion (153). *Roe* created a trimester framework to balance a woman's right to an abortion with a state's interest in protecting the health and life of the mother and the "potentiality of human life" (162, 164-165). States were not allowed to regulate abortion at all during the first trimester, could introduce regulations that reasonably protected the health of women during the second trimester, and could

regulate or ban abortion during the third trimester because fetal viability provides a “compelling interest” (*Roe v. Wade* 164-165).

Almost twenty years later, the Court revisited the *Roe* decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In a co-authored opinion by Justices O’Connor, Kennedy, and Souter, the Court partially upheld and partially overruled *Roe* (*Planned Parenthood of Southeastern Pennsylvania v. Casey*). The *Casey* Court reaffirmed the right to have an abortion and maintained the viability standard (846). However, it replaced the trimester framework with the “undue burden” standard (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 873-874), in which a state could not enact regulations that had “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 877). Because of the vagueness of the “undue burden” standard, the Court had greater flexibility in permitting abortion regulations under its interpretation of the Due Process Clause (Moses 805).

2. Justice Scalia’s *Casey* Dissent

Justice Scalia consistently called for *Roe* and *Casey* to be overruled during his time on the Court. He often cited them as examples of precedents he would not adhere to (Scalia, *A Matter* 140; Scalia and Garner 413). Although Justice Scalia did not live to see or be a part of the *Dobbs* decision, his *Casey* dissent provides a detailed analysis of his view regarding a constitutional right to abortion and the application of *stare decisis* (*Planned Parenthood of Southeastern Pennsylvania v. Casey*).

Justice Scalia believed that *Roe*’s methodology was erroneous, not only because the Constitution is silent on the issue, but also because long-standing American tradition provides evidence *against* such a constitutional right (980). He wrote that “[a] State’s choice between two

positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a ‘liberty’ in the absolute sense” (980). This means that states are allowed to make their own value judgments, which the Court should not force upon the entire country. It is up to the people to persuade each other through the democratic process.

Justice Scalia also discussed the *Casey* Court’s application of *stare decisis*. He chided the Court for ignoring the lack of “reasoned judgment” in *Roe* and upholding it because of *stare decisis*:

after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in these and other cases, the best the Court can do to explain how it is that the word ‘liberty’ must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. (983)

Ultimately, Justice Scalia believed that the *Casey* Court had engaged in a “keep-what-you-want-and-throwaway-the-rest” version of *stare decisis* by simultaneously claiming that it was not overruling the central holding of *Roe* while discarding the trimester framework, which he believed was just as central to *Roe* as the viability line that the *Casey* Court retained (993-994).

With regards to the undue burden standard, Justice Scalia believed that it was unprincipled and unworkable because (1) it is “inherently manipulable” (986), (2) it has no principled legal basis (987), (3) it places other constitutional rights at risk (988), and (4) it is arbitrary (988-993). It thus “permits the State to pursue that interest [protecting potential human life] only so long as it is not too successful” (992). In the years following the *Casey* decision, he

repeatedly criticized the undue burden standard as placing judges in the position of acting as legislators and making policy judgments (Scalia and Garner 413).

Justice Scalia also noted that *Roe* had exacerbated disagreements over abortion, especially because it short-circuited the democratic process, believing that the *Casey* decision would deepen that division (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 995, 1002). Moreover, he pointed out that at least two of the Justices had to abandon previously stated positions to adhere to “principle” (997). Instead of allowing public perception to determine how the case should be decided, Justice Scalia argued that the Court should have assessed whether *Roe* was correctly decided and whether it produced a settled body of law. Given that the answer to both was no, it should have been overruled (999).

There has been some speculation about whether Justice Scalia’s resolve against *Roe* and *Casey* weakened towards the end of his tenure, though this has not been confirmed (Naham). As recently as 2012, in his co-authored book, *Reading Law*, with Bryan Garner, Justice Scalia asserted that *Roe v. Wade* should not be adhered to because it is analytically unsound, has not been generally accepted, and (as a product of *Casey*) places judges in the position of acting as legislatures (413). Furthermore, *Roe* and *Casey* were often his prototypical examples of when he would *not* adhere to *stare decisis* (Scalia, “Law” 25:13-27:20; Scalia, “Legally Speaking” 25:08-26:55; Scalia and Garner 413). Thus, he likely would have joined the Court in overruling them had he been given the chance.

3. *The Dobbs Case*

Following the *Casey* decision, states continued to pass abortion regulations in an attempt to chip away at *Roe* and *Casey*. In 2018, the Mississippi State Legislature passed the “Gestational Age Act,” a pre-viability statute prohibiting most abortions after 15 weeks of

gestational age. Jackson Women's Health Organization sued Mississippi, arguing that the law was unconstitutional under *Roe* and *Casey* ("Thomas E. Dobbs" 44:30-45:27). Mississippi, in response, countered that *Roe* and *Casey* should be overruled ("Thomas E. Dobbs" 1:52:46-1:52:59). Consequently, Mississippi asserted that rational-basis review applied and that the statute was constitutional ("Thomas E. Dobbs" 4:15-4:45).

The Court had a few options for how to decide the case. First, it could have reaffirmed the right to an abortion under *Roe* and *Casey* and consequently struck down the law as failing to meet the viability standard. It also could have accepted the petitioner's arguments that there is no constitutional right to an abortion, overruled *Roe* and *Casey*, and upheld the statute under rational-basis review. This was the route the Court took. Alternatively, it could have upheld *Roe* and *Casey* but also upheld the statute, which was Chief Justice Roberts's position. Finally, the Court could have gone further than it did and overruled substantive due process as a doctrine, or at the very least, overruled most substantive due process cases. Justice Thomas's concurring opinion came the closest to this position. The Court has never seriously considered whether the Fourteenth Amendment's protection of "life" extends to the unborn.

4. *The Dobbs Decision*

Justice Alito wrote the majority opinion for the Court, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. The Court held that the Constitution does not confer a right to an abortion and, therefore, applied rational-basis review to determine the statute's constitutionality (*Dobbs v. Jackson Women's Health Organization* 5, 77). Under rational-basis review, the statute was found to be constitutional because Mississippi has a legitimate state interest in protecting fetal life (78). It argued that *Casey*'s affirmation of *Roe*'s holding based on *stare decisis* was improper in that it did not examine whether a right to abortion exists in the

Constitution, and it did not examine the strength of *Roe*'s reasoning (8). Instead, *Casey* attempted to settle a national debate that has only become more contentious (6). The *Dobbs* Court then conducted its own analysis under the *Glucksberg* test (12). It did not find abortion to be rooted in the Nation's history and tradition or an essential component of ordered liberty. Therefore, the Court concluded that it is not part of the liberty protected under the Fourteenth Amendment (5, 14-15). As a result, the Court returned the power to decide the issue to the people in each state (35). While the Court acknowledged that *stare decisis* is important, it emphasized that it is ““not an inexorable command”” (qtd. in *Pearson v. Callahan* 7) and can be overruled (39). In cases of constitutional adjudication, it is particularly imperative that issues be evaluated and settled correctly because the Court is the primary means for correcting mistakes (given the difficulty of amending the Constitution [40]). The Court put forth five factors in favor of its decision to overrule *Roe* and *Casey*, including (1) the nature of the Court's error, (2) the quality of the decisions' reasoning, (3) their workability, (4) the disruptive effect on other areas of law, and (5) the (lack of) reliance interests at stake (43).

In overruling the right to an abortion, the Court did not also overrule other substantive due process cases, writing that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion” (66). It argued that abortion is not analogous to other substantive due process cases like *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges* because abortion involves the destruction of a “potential life,” whereas these other precedents do not (66). Moreover, the Court held that “[e]ach precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence” (71-72).

Justice Kavanaugh wrote a concurring opinion in which he reiterated that because the Constitution does not take sides on the issue, the Court cannot take sides—it is up to each state to decide its own policies and values regarding abortion through the democratic process (Kavanaugh, Concurring opinion, *Dobbs v. Jackson Women’s Health Organization* 3). This means that *outlawing* abortion would also be wrong as a constitutional matter (3). Justice Kavanaugh then discussed the *stare decisis* considerations that favor overruling *Roe* and *Casey*, which were essentially the same as those considered by the Court but organized in the context of his *Ramos v. Louisiana* concurring opinion. They included the erroneousness of the decision, the negative jurisprudential or real-world consequences, and the reliance interests (7). Finally, Justice Kavanaugh clarified that he does not believe that states can prevent residents from traveling to other states to obtain abortions, nor can states impose retroactive punishments or liabilities (10).

Justice Thomas also wrote a concurring opinion in which he agreed that there is no right to an abortion but insisted that the Due Process Clause only guarantees *process* (*Dobbs v. Jackson Women’s Health Organization* 1-2). He claimed that substantive due process allows judges to act as unelected legislators at the expense of the People, it distorts other areas of law, and is used to disastrous and harmful ends (4-6). Therefore, because the Due Process Clause does not guarantee substantive rights, it automatically does not guarantee a right to an abortion. Regardless, he believed the Court correctly applied the *Glucksberg* test (1). However, Justice Thomas called for the Court to reconsider all of the Court’s substantive due process cases, including *Griswold*, *Lawrence*, and *Obergefell*. He acknowledged that because abortion is unique and the Court was not asked to reconsider all its substantive due process jurisprudence, the

Dobbs decision does not cast doubt on non-abortion precedents (3). Still, the Court “should eliminate it from our jurisprudence at the earliest opportunity” (7).

Finally, Chief Justice Roberts wrote an opinion concurring only in the judgment. He agreed that the viability line does not make sense and should be discarded (Roberts, Concurring opinion, *Dobbs v. Jackson Women’s Health Organization* 1). Nonetheless, he would not have overruled *Roe* and *Casey*. Instead, he would have replaced the viability standard, which he did not believe was “inextricably entangled with” *Roe* and *Casey* (7), with “a reasonable opportunity to choose” standard. Under this new “reasonable opportunity” standard, the Mississippi law is constitutional (1).

Justice Breyer, Justice Sotomayor, and Justice Kagan dissented in a joint opinion. They attacked the majority’s use of originalism and the *Glucksberg* test, writing that “[t]he Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply” (Breyer et al. 17). Quoting *NLRB v. Noel Canning*, they claimed that “[t]he Founders... knew they were writing a document designed to apply to ever-changing circumstances over centuries” (17 [Breyer et al. 16]). The dissent rejected the idea that this position implies that judges can enshrine whatever rights they want. Instead, they argued that judges must look to history and precedent in its entirety and apply the Constitution to new circumstances as they evolve (17-18). In the case of abortion, they asserted that the men who ratified the Fourteenth Amendment did not understand the full scope of women’s liberty, rights, and equality, including in the area of reproductive rights (14). The dissenters believed that *Roe* and *Casey* considered this and correctly inferred that the government cannot infringe on a woman’s bodily autonomy and ability to make decisions about her future (1).

Moreover, the dissent believed that the *Roe* and *Casey* Courts understood that there are genuine and honest disagreements about abortion and appropriately took this into account. *Roe* and *Casey* struck a balance—that the majority has now destroyed—by protecting a woman’s right to choose up until viability and allowing the States to regulate thereafter (1-2). As a result of the *Dobbs* decision, women’s rights have been stripped from them (2). The dissent also discussed *stare decisis*, concluding that “[t]he Court reverses course today for one reason and one reason only: because the composition of this Court has changed” (6).

5. *The Stare Decisis Considerations in Dobbs*

The *Dobbs* Court considered five key factors that supported its decision to overrule *Roe* and *Casey*. First, *Roe* was not just wrong but *egregiously* wrong (from an originalist and textualist perspective), as it was “far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed” (*Dobbs v. Jackson Women’s Health Organization* 44). *Casey* perpetuated *Roe*’s errors, and its egregiousness is heightened by the deepened division and halt to the democratic process on a morally and socially important issue (44). Polling data seems to support this claim. Though most Americans support abortion in at least some cases, the partisan gap between Republicans and Democrats has widened, and support for abortion depends on the circumstances of the pregnancy (Blazina). These divisions have remained relatively stable for years (“Public Opinion”).

Second, the Court claimed that the quality of *Roe*’s reasoning was weak (*Dobbs v. Jackson Women’s Health Organization* 45-56). *Roe*’s central holding and trimester framework were not grounded in text, (relevant) precedent, or history (47), and the viability rule was arbitrary and made little sense (53). *Roe*’s reasoning has been criticized, even by supporters of abortion, and *Casey* itself did not defend or preserve it, getting rid of the privacy rationale and

abandoning both *Roe*'s historical analysis and trimester framework (53-54, 55). However, the *Casey* Court did not fix the arbitrary viability standard or defend abortion other than citing *Roe* as the basis for its decision. Instead, it introduced the unprincipled and unsupported "undue burden" standard (55).

Casey's "undue burden" standard was the third reason the Court believed *Roe* and *Casey* should be overruled. The Justices considered it to be unworkable. Workability involves considering whether a rule can be utilized consistently and predictably (56). The Court found the "undue burden" standard challenging to apply and a source of conflict among the circuit courts (60). Therefore, the Court believed that to apply legal principles consistently, it needed to be abandoned.

Fourth, the *Dobbs* Court pointed out that *Roe* and *Casey* distorted and disrupted other unrelated areas of law (62). For example, they weakened the strict scrutiny standard for facial constitutional challenges, third-party standard doctrine, standard *res judicata* principles, severability rules, rules on avoiding constitutional questions when reading statutes if possible, and First Amendment jurisprudence (63). The Court stated that if it must "engineer exceptions to longstanding background rules," the doctrine is unprincipled and fails to promote stability and predictability (63).

Finally, the Court considered the reliance interests at stake (63-66). In *Casey*, the Court argued that individuals had organized their lives knowing women could obtain an abortion if contraception failed (856). In 2020, 620,327 legal abortions were reported to the Centers for Disease Control and Prevention, half of which were for women in their twenties (Kortsmit et al. 4, 5).⁷ However, the *Dobbs* Court rejected what it considered to be *Casey*'s more generalized and

⁷ This is an underestimate because California, Maryland, and New Hampshire did not report their data (Kortsmit et al. 8).

nonspecific set of reliance interests. Instead, it argued that the correct standard, for *stare decisis* purposes, based on the Court's precedents, is to look at *concrete* reliance interests, which "arise 'where advance planning of great precision is most obviously a necessity'" (qtd. in *Planned Parenthood of Southeastern Pennsylvania v. Casey* 856 [64]). It concluded that there was a lack of concrete reliance interests in *Roe* and *Casey* because obtaining an abortion is typically unplanned, and women can still plan their reproductive lives if states are allowed to ban abortions (*Dobbs v. Jackson Women's Health Organization* 64).

In its discussion about reliance interests, the Court also noted that there is a lack of consensus on the effects of abortion on women as well as the status of the fetus. The Court did not believe itself sufficiently knowledgeable or that it had the authority to pick a side. As women have considerable influence in the political process, the Court believed they have the power to shape policies at the state level based on their value judgments (65-66). In making this point within the broader reliance interests discussion, the Court seemed to be claiming that if women truly rely on abortion when contraception fails, they can insist on access to it through the political process. However, if women do not insist upon it, they may not be or were not significantly relying on it. Either way, the Court believed this is a decision best left to the citizens of each state. As a tangential note, following the *Dobbs* decision, of the ten states (not including D.C.) with the highest abortion rates, according to U.S. News, six remained protective or very protective of abortion, two have some restrictions and some protections, and two are now restrictive or very restrictive (Johnson; "Interactive Map"). Therefore, many of the states where numerous abortions occur have retained at least some access to it.

The *Dobbs* Court made a few other notable comments. It argued that it is not the Court's place to exceed its sphere of authority because of what the public perception might be (67). Nor

is it the Court's place to state that an erroneous precedent is not subject to traditional *stare decisis* principles, which is what the *Casey* Court did. The Court's job is to exercise legal judgment and apply traditional *stare decisis* principles (71).

The dissent also expanded on *stare decisis* in their opinion, disagreeing with much, if not all, of the Court's analysis (Breyer et al. 5-6). They remarked that not only have *Roe* and *Casey* been the law of the land for half a century, but "Casey is a precedent about precedent" (1, 6). Moreover, in order to overrule a decision, there must be "special justification" beyond the case having been wrongly decided, which was not the case in *Dobbs*, primarily because *Roe* and *Casey* were correctly decided. Regardless, they contend that there have been no undermining changes in legal doctrine or facts, nor is there "an absence of reliance because the earlier decision was less than a decade old" (31). On the contrary, there are strong reliance interests—millions of women have planned their lives with the expectation that they can obtain an abortion, a choice that is essential to women's identities (32, 48, 51). They also countered the Court's claim that the "undue burden" standard is unworkable; at least, it is not more unworkable than the many other general standards that judges constantly work with (33). That the standard produces disagreements "is to be expected in the application of any legal standard which must accommodate life's complexity" (qtd. in *Planned Parenthood of Southeastern Pennsylvania v. Casey* 878 [34]). The dissent regarded the majority's new standard to be much more complex, predicting, for example, that courts will subsequently need to consider whether state statutes must protect maternal life and health (and to what extent) and how the morning-after pill, in vitro fertilization, and miscarriages will be implicated (35-36). Moreover, the dissent noted that the decision invites questions about interstate travel and commerce related to abortion access (36-37).

Finally, the dissent repeatedly emphasized the damaging consequences the *Dobbs* decision will have on abortion and other substantive due process rights. Some states already have laws that do not make exceptions for instances of rape and incest, and states may choose to force women to endure pregnancy even when doing so would place them at severe risk (2, 3). They worried that states would go as far as to criminalize women (3). As a result, many women may try unsafe abortion methods, or if they carry the pregnancy to term (especially for women who cannot afford to travel), they will face harm to their future, dignity, and equality (4, 38, 40). Moreover, they expressed concern that the language in the *Dobbs* opinion does not prevent the federal government from instituting a federal *ban* (3). Regarding other substantive due process rights, such as those protected in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*, the dissent argued that “[t]hey are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions” (4-5). Accordingly, the dissent believes that by the majority’s reasonings, these rights would also not be deeply rooted, meaning that the majority either does not believe its own principled reasons for why *Roe* and *Casey* were egregiously wrong, or these other rights are now in danger (5). The dissent asserted that the majority failed to demonstrate judicial humility and, as a result, has harmed the legitimacy of the Court (5, 60). Ultimately, the dissenting Justices claimed that the Court overruled *Roe* and *Casey* for one reason—because it believed them to be egregiously wrong (32).

6. *Takeaways from the Dobbs Court’s Application of Stare Decisis*

In analyzing the *Dobbs* opinion, it is important to note that Justices can join opinions without agreeing to all the underlying rationales in that opinion. None of the originalist Justices wrote the majority opinion. Justices Thomas and Kavanaugh wrote concurring opinions, but Justices Gorsuch and Barrett did not. Even so, it is possible to gauge the originalist Justices’

beliefs about *Roe* and *Casey*, given their long-standing status as precedents and the criteria they stated they would consider.

The *Dobbs* opinion, Justice Kavanaugh's concurrence, and Justice Scalia's *Casey* dissent all emphasized that *Casey* did not correctly apply *stare decisis*, which appears to have harmed the consideration of *Casey* as precedent on top of precedent. In fact, the Justices may have considered *Casey*'s perpetuation of *Roe* to weigh in favor of overruling both precedents because *Casey* was compounding *Roe*'s egregiousness. The Court instead reevaluated *Roe* and *Casey* under what it considered traditional *stare decisis* considerations.

There are several similarities between *Dobbs*'s *stare decisis* factors and those the Justices articulated elsewhere, as the following discussion demonstrates. First, the *Dobbs* Court considered the erroneousness of the precedent, evaluated under the *Glucksberg* test. The Court examined the methodology, the strength of the reasoning, how it impacted the democratic process, and the damaging consequences of supporting their determination about *Roe*'s and *Casey*'s egregiousness. Although Justice Kavanaugh emphasized in his concurrence that erroneousness is insufficient to overrule a precedent (7), it appears to have been the starting point and a crucial factor, if not the most important one. This is evident from the significant amount of space the *Dobbs* Court dedicated to constitutional history, precedent, and text in order to demonstrate how wrong *Roe* was when it was decided.

Second, the *Dobbs* Court considered reliance interests, though it clarified that they would only consider *concrete* reliance interests. In his *Lawrence v. Texas* dissent, Justice Scalia also favored concrete reliance interests (591-592). Before the *Dobbs* decision was handed down, scholar Nicholas Iacono argued that predicting the Court's decision would be difficult because of the vagueness of the concept of reliance interests (414). Iacono defined "specific reliance" as

“‘[r]eliance upon a precedent by a discrete group of private citizens or entities,’ which exists ‘when [they] take actions or order their affairs in dependence on a rule set out in a precedent’” (qtd. in Mills 2103 [414-415]) and “societal reliance” as an abstract and generalized reliance on rules that have become “‘ingrained in the American consciousness’ (qtd. in Kozel, “Stare Decisis” 462) and have shaped ‘societal perceptions about our country, our government, and our rights’” (qtd. in Kozel, “Stare Decisis” 460 [415]). Though Iacono acknowledged that “specific reliance” is stronger than “societal reliance,” (414) he predicted that the originalist Justices would not completely overrule *Roe* because of the “societal reliance” interests at stake (416). His prediction was incorrect, and the *Dobbs* opinion very clearly answered what kind of reliance interests are pertinent.

The *Dobbs* decision additionally noted that rules of property are examples of concrete reliance interests (64). As the originalist Justices have noted in the past, rules of property and contracts often receive heightened consideration. Though people organize their lives around the possibility of getting an abortion, that sentiment (organizing one’s life) is broadly true for all judicial decisions. Abortion rights implicate a *potential* future reliance—if a woman gets pregnant, she then *may* want to obtain an abortion. Furthermore, the Court reasoned that a pregnancy that leads to abortion is typically unplanned, and women can still make decisions about their reproductive lives even if abortion is heavily regulated or prohibited. Additionally, overruling *Roe* and *Casey* would not automatically make abortion illegal, an argument Justice Scalia used to directly attack *Casey*’s societal reliance standard in his *Lawrence* dissent (591-592). Though not everyone may be able to afford to travel out of state to the nearest abortion clinic, this was seemingly not enough to overcome the lack of a constitutional right to an abortion. The *Dobbs* Court likewise was not persuaded by the *Casey* Court’s argument that

abortion access is vital to women's ability to participate equally in social and economic life as a concrete reliance interest analogous to tangible property and contract rights (64).

Iacono's prediction that *Roe* would not be overruled was likely incorrect because his analysis was primarily focused on reliance interests. His argument that reliance interests are disproportionately favored is a compelling one, namely because of the value this consideration has in protecting the integrity and legitimacy of the judiciary, predictability, stability, and respect generally for the rule of law, especially when there are economic interests and financial livelihoods at stake (Iacono 419-420). However, he emphasized reliance interests to the detriment of other significant *stare decisis* factors that the Court heavily relied upon, especially the erroneousness of the precedent. The *Dobbs* opinion did not place as much weight on reliance interests as Iacono, though this may be because the Justices disagreed that significant reliance interests were at stake. If the Court had believed that overruling its abortion jurisprudence implicated concrete reliance interests, it may have been significantly more influential in the Court's overall analysis. It is challenging to weigh the two kinds of reliance interests against one another because Justice Alito, not one of the originalist Justices, wrote the opinion. However, in footnote three of his concurring opinion, Justice Kavanaugh agreed with the concrete reliance interest standard (8).

Third, the *Dobbs* opinion discussed workability, which was evidently influential in its decision to overrule *Casey*'s "undue burden" standard. The Court connected the lack of workability of the standard to the erroneousness of the opinion—that it is arbitrary and lacks justification (*Dobbs v. Jackson Women's Health Organization* 56-62). Thus, it can be inferred that the difficulty in applying the "undue burden" standard was problematic, but its erroneousness as a judicial rule elevated workability as an important *stare decisis* consideration.

This strengthens the inference that erroneousousness was one of the most, if not the most important, factors in the *Dobbs* decision.

Finally, regarding how deeply entrenched the precedent is within the constitutional system, the *Dobbs* Court explicitly noted that *Roe* and *Casey* have not been generally accepted, which contradicted the *Casey* Court's prediction that its "compromise" decision could and would resolve the national abortion debate (*Dobbs v. Jackson Women's Health Organization* 6). In footnote four of his concurrence, Justice Kavanaugh noted that *Casey*'s *stare decisis* analysis relied on this prediction, arguing that it undermines *Casey*'s status as precedent—not because public opinion should be the basis by which to reaffirm or overrule a precedent, but because it was used in place of a traditional *stare decisis* analysis (8). This may suggest that the weight the originalist Justices gave *stare decisis* in *Dobbs* is unique because of how they viewed *Casey*'s reconsideration of *Roe*, though the crux of the *Dobbs* opinion still appears concerned with the erroneousousness of *Roe*'s reasoning. This implies that *Casey* being precedent on precedent was not given extra weight by the originalist Justices. In fact, its perpetuating effect may have provided an additional reason to overrule both cases.

Despite the many similarities between the previously stated criteria and the factors examined in *Dobbs*, there were a few notable differences and distinctions. The first is that, as the dissent suggested, there were no significant changes in facts or law since *Roe* and *Casey* were decided. Therefore, the decisions had not been undermined by changing circumstances, a factor that the originalist Justices have claimed they would consider. However, the *Dobbs* Court asked whether "the dissent really maintain[s] that overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects?" (70). Furthermore, it noted that in the case of

Virginia Board of Education v. Barnette (which overruled *Minersville School District v. Gobitis*), there had not been any changes other than the Court's recognition that *Gobitis* was wrong (70). In other words, the Court implied that this is not an extremely important *stare decisis* criterion, specifically when a case is egregiously wrong. On the other hand, it can be inferred from the *Dobbs* opinion that the originalist Justices did believe there was a kind of change in circumstances, including the increased discussions and debates about the reliance interests at stake as well as about the question of whether a fetus is a human life (in addition to being undermined by a correct reading of text, tradition, and history). Furthermore, the "undue burden" standard introduced a significant amount of judicial subjectivity in subsequent cases and as already mentioned, *Casey*'s prediction, specifically as a driving force behind its decision to invoke *stare decisis*, was not vindicated. However, the dissent made a compelling argument that there have not been significant changes in fact and law, and the *Dobbs* Court implicitly acknowledged this in its response.⁸

Second, *Roe* and *Casey* were not isolated decisions. Abortion rights had been embedded in the Court's jurisprudence for almost fifty years before the *Dobbs* decision, a point the dissent spotlighted. Furthermore, *Roe* and *Casey* were embedded within the Court's well-established substantive due process jurisprudence in addition to theories and arguments about privacy and bodily autonomy. The *Dobbs* Court was cognizant of this because it repeatedly and explicitly refused to overrule other substantive due process precedents. It can thus be concluded that *Roe* and *Casey* were egregious enough to warrant demoting the importance of this factor. The approach the Court has seemingly taken is to narrow the scope for determining which *future*

⁸ The *Dobbs* Court noted, on this point, that "[t]he unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough. The Court has never adopted this strange new version of *stare decisis*—and with good reason (69-70)."

unenumerated rights are protected and reevaluate previous cases based on their *stare decisis* criteria so that there is not (or less of) a ripple effect if certain substantive due process cases are overruled. It should also be mentioned that the Court repeatedly emphasized that the “potential fetal life” involved in abortion was a critical distinguishing factor between *Roe* and *Casey* and other substantive due rights. The implication is that *Roe* and *Casey* are distinct in a way and, thus, in the Court’s view, can be disentangled and overruled without necessarily harming the jurisprudential fabric holding the other rights together. In addition, the lack of workability of the *Casey* “undue burden” standard appeared to trump this consideration because it would be too difficult, in the Court’s opinion, to continue to struggle to determine its meaning as it applies to different state regulations, which it has done in many cases since *Roe* and *Casey*.

Third, and most notably, the *Dobbs* opinion contained no explicit mention of the antiquity of *Roe* and *Casey*, a factor the originalist Justices have expressly stated they would consider. However, it was implicitly dismissed as an important criterion when the Court rhetorically asked the dissent whether overruling *Plessy* was unjustified despite having been law for over half a century when *Brown* was decided. This indicates that the Justices believed that the age of a precedent cannot supersede its erroneousousness. It is also likely that the potential human life involved in abortions decreased the importance of antiquity as a consideration. However, there remained a respect for the antiquity of precedent in every Justices’ refusal to join Justice Thomas’s call to overrule substantive due process as a legal doctrine, which has been entrenched in constitutional law for approximately a century and a half.

Nevertheless, given the majority’s view in the *Dobbs* decision, the Justices may also believe other substantive due process cases are unconstitutional. From an originalist and traditionalist perspective, the *Dobbs* reasoning would suggest that rights protected in many of

those other cases do not have a constitutional basis, as the *Dobbs* dissent noted. Therefore, although no Justice joined Justice Thomas's concurrence to reconsider the other substantive due process precedents as soon as possible, it does not indicate that they would not reconsider them if asked to by a party to a case. The *Dobbs* opinion left this possibility open, writing:

Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence. (71-72)

Given the numerous rights that have been protected under substantive due process, it is worth contemplating how the Justices' *stare decisis* factors may impact their decisions to overrule or uphold some of these other precedents (if asked) in light of how those factors were prioritized and applied in *Dobbs*. The following sections will look at the cases Justice Thomas explicitly mentioned in his *Dobbs* concurrence—specifically sexuality (*Lawrence v. Texas*), same-sex marriage (*Obergefell v. Hodges*), and contraception (*Griswold v. Connecticut*).

F. Sexuality/Homosexuality

1. Bowers v. Hardwick (1986)

In 1986, the Supreme Court decided *Bowers v. Hardwick*, which considered whether a Georgia law criminalizing sodomy was constitutional. Though the law did not facially distinguish heterosexual and homosexual behavior, in this instance, it was enforced against two men (*Bowers v. Hardwick* 186). In a five-four decision, the Court found *no* fundamental or constitutional right to consensual homosexual sodomy, thereby making the statute (and others like it) valid. Moreover, the *Bowers* Court did not believe that precedents involving family relationships, marriage, or procreation could provide a basis for or were analogous to the issue at

hand, nor that the liberty at stake was ““implicit in the concept of ordered liberty”” (qtd. in *Palko v. Connecticut* 319) or ““deeply rooted in the Nation’s history and tradition”” (qtd. in *Moore v. City of East Cleveland* 503 [191-192]). It also did not matter to the *Bowers* Court that the conduct occurred in the home (196-197). The Court additionally supported its refusal to protect this liberty under the Due Process Clause by citing the importance of judicial discretion and curbing judicial policymaking (194-195).

2. *Lawrence v. Texas* (2003)

In 2003, a Texas law that made it illegal to engage in deviate homosexual activities was challenged on the grounds that it violated the Equal Protection Clause (as only homosexual conduct was criminalized) and the liberty provision of the Due Process Clause of the Fourteenth Amendment (*Lawrence v. Texas* 562-564). In *Lawrence v. Texas*, a six-three Court overruled *Bowers* and found that the law did violate the Due Process Clause. It argued that the *Bowers* Court did not discern how much liberty was truly at stake and that the consequences of engaging in homosexual intimacy were far-reaching, especially because it penalized extremely private conduct within personal relationships in a highly private location—the home (567). The *Lawrence* Court also argued that there is no longstanding history of laws specifically targeting this kind of behavior separate from non-procreative sexual activity. Thus, homosexual and heterosexual conduct were historically treated as one category for regulation. Moreover, these early laws were not enforced (568-571). The *Lawrence* Court, as a result, concluded that the history is more unclear than the *Bowers* Court assumed or acknowledged.

Nonetheless, even if homosexuality has long been considered immoral, the *Lawrence* Court did not believe it was the Court’s job to define morality (571). The past half-century has instead revealed an “emerging awareness that liberty gives substantial protection to adult persons

in deciding how to conduct their private lives in matters pertaining to sex” (572). The Court referenced cases such as *Casey* and *Romer v. Evans* and criticisms of *Bowers* to indicate that *Bowers* had been subsequently undermined (576). Ultimately, traditional moral views were insufficient for the *Lawrence* Court to justify the stigma they believed the Texas law imposed on gay individuals (575).

Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, wrote a scathing dissenting opinion. In refusing to declare homosexual sodomy a “fundamental right” under the Due Process Clause, he argued that the *Lawrence* Court struck down the law inconsistently with the rational-basis review standard it claimed to be using (586). Justice Scalia then declared that he did not “believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine,” calling out the Court for its hypocrisy in overruling *Bowers*, but not overruling *Roe* in *Casey* (587). For example, he noted that the *Lawrence* Court considered the criticism of *Bowers* a reason to overturn it, but the *Casey* Court considered criticism of *Roe* a reason to reaffirm it (587). In addition, he asserted that the *Lawrence* Court’s reasoning cast doubt on and made no distinction between criminal statutes of many other traditionally immoral behaviors, such as “bigamy, same-sex marriage, incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” (590). Justice Scalia’s prediction bore out regarding same-sex marriage, and state laws prohibiting it were deemed unconstitutional in 2015 in *Obergefell v. Hodges*. Ultimately, Justice Scalia countered the *Lawrence* Court’s historical narrative and maintained that homosexual sodomy fails the *Glucksberg* test. He also maintained that the Court did not need to decide the morality of criminalizing homosexual sodomy because the democratic process would provide a legitimate means for the people to decide for themselves and persuade each other (603). Justice Thomas

also filed a short dissent, calling the Texas law “‘uncommonly silly’” (qtd. in *Griswold v. Connecticut* 527) but outside of the Court’s scope to strike down (605-606).

3. *The Stare Decisis Considerations*

Given that *Lawrence* protects a substantive, unenumerated right, Justice Thomas would overrule it primarily based on its erroneousness, as he does not believe in the existence of substantive due process. The other originalist Justices are likely to agree that *Lawrence* was decided erroneously under the *Glucksberg* test because homosexual intimate conduct is not deeply rooted in tradition and history, nor is it rooted in originalism. They would likely point to the *Lawrence* opinion as support for its erroneousness because, although the *Lawrence* Court asserted that the history is more complex and nuanced, it explicitly focused on an “emerging” awareness and history (572). In addition, it is quite probable that the originalist Justices would note that *Lawrence* removed the right of the people to decide the issue through their elected representatives, a factor emphasized by the *Dobbs* Court. Thus, they are likely to believe that *Lawrence*’s egregiousness will be remedied by returning the issue to the states rather than continuing to assume a moral stance on behalf of the entire nation. Finally, the originalist Justices are likely to view the *Lawrence* Court’s reasoning as weak, given that it justified its holding based on stigma and harm to dignity, as well as a comparison to European standards, which are not rooted in constitutional text, history, or the nation’s traditions (573-575). However, the Justices may view *Lawrence* as less egregiously wrong than *Roe* and *Casey* because it does not involve potential human life. Nonetheless, it appears to be egregious enough that the originalist Justices would believe that an inquiry into the other *stare decisis* factors is warranted because the decision would still be, in their view, “outside the bounds of any reasonable

interpretation of the various constitutional provisions to which it vaguely pointed” (*Dobbs v. Jackson Women’s Health Organization* 44).

Another criterion that suggests that the originalist Justices would support overruling *Lawrence*, if they consistently apply their standard of *stare decisis*, is the consideration of reliance interests. The Justices will presumably analogize the lack of concrete reliance interests in *Dobbs* to a lack of concrete reliance interests in *Lawrence* (in addition to the lack of rules of property or contracts implicated). Though individuals organize their relationships and lifestyles around what is lawful, the Justices are unlikely to view these reliance interests as requiring “advance planning of great precision” (*Planned Parenthood of Southeastern Pennsylvania v. Casey* 856). Furthermore, in *Dobbs*, the Court claimed that women can still plan their reproductive lives post-*Dobbs*, and the Justices can be expected to view that argument to hold in a post-*Lawrence* world, especially when there is no chance of pregnancy involved.

There are several criteria, however, that favor upholding *Lawrence*. For example, the lack of workability of *Casey*’s “undue burden” standard was a significant factor in the *Dobbs* decision. Comparatively, *Lawrence* is significantly more workable because its holding is clear—states cannot ban homosexual intimate conduct. The decision is thus easy to apply and requires fewer judgment calls. Second, though *Lawrence* does not have unanimous or overwhelming support from the American public, it enjoys greater acceptance than *Roe* and *Casey*, as public opinion has since shifted in favor of homosexuality. In 2003, when *Lawrence* was decided, less than half of Americans believed that homosexual relations were morally acceptable or should be legally permissible. In 2022, the percentage rose to about seventy and eighty percent, respectively (“LGBT Rights”). This increase in acceptance has occurred even among Republicans, though the partisan gap remains wide, and U.S. support is one of the lowest among

Western European and North and South American countries (Poushter and Kent). Five states also repealed their sodomy laws in the wake of the *Lawrence* decision. However, fourteen states have still not repealed their sodomy laws, eleven of which are enforceable against heterosexual and homosexual sodomy, and three of which apply specifically to homosexual sodomy (Rude). Still, public opinion is shifting, and many of these fourteen states may repeal those laws if *Lawrence* is overturned. Although the *Dobbs* Court stated that public opinion does not and should not influence the Court's decision, as it pertains to how much acceptance the precedent has received, this is likely to be a consideration.

Third, *Lawrence* has not been undermined by subsequent facts, law, or circumstances, although this may not be very important to all the Justices, given that there were arguably no changes in facts, law, or circumstances in *Dobbs*. Fourth, *Lawrence* is not "isolated." There have certainly been more cases related to abortion than intimate homosexual conduct, but *Lawrence* does not implicate potential human life in the same way that *Roe* and *Casey* did. *Lawrence* also paved the way for same-sex marriage protections in *Obergefell* and is part of a constitutional fabric entrenched in law, justified by certain arguments about liberty, privacy, and autonomy. The originalist Justices may thus be less likely to overrule *Lawrence* if they do not want to also overrule *Obergefell*. On the other hand, they may believe that *Obergefell* should be overruled or see a path for the existence of *Obergefell* even if *Lawrence* is overturned. Regardless, the *Dobbs* Court strongly implied that all these substantive due process cases can be treated separately, suggesting that, even if *Lawrence* is not actually isolated, the originalist Justices will treat it as though it is for the purposes of determining whether to overrule it. Finally, *Lawrence* is much younger than *Roe* and *Casey*, though it has been law for about twenty years, which is a significant amount of time. Antiquity was not a consideration in *Dobbs*, but the lack of potential

human life in *Lawrence* might increase this criterion's importance, though it is unlikely to be more important than the egregiousness factor.

In sum, the criteria do not all point one way or the other. The erroneousness of *Lawrence*, the lack of concrete reliance interests, and the somewhat still-divided opinion on the morality of homosexuality weigh in favor of overruling *Lawrence* if the Justices consistently apply the *stare decisis* criteria. On the other hand, *Lawrence*'s workability, the change in public opinion on the issue, the lack of potential human life at stake, and the reality that such conduct occurs in the privacy of the home might convince the Justices to leave *Lawrence* alone. Though *Dobbs* was controversial, abortion is a much more contentious issue than gay and lesbian rights (as a negative liberty matter). Regardless, it would not be surprising if the Court chose to overrule *Lawrence* if asked, particularly if the Court believes that what it may see as weak and erroneous reasoning in *Lawrence* can or will be used beyond *Obergefell* in future cases.

G. Same-Sex Marriage

1. Baker v. Nelson (1971)

In 1971, after John Baker and James Michael McConnell were refused a marriage license, they claimed a constitutional right to same-sex marriage based on the First, Eighth, Ninth, and Fourteenth Amendments (Shirey). The Minnesota Supreme Court denied their claims ("Baker"). The United States Supreme Court released only a summary decision under mandatory review that there was no "substantial federal question" (Janet 1778, 1779). Nevertheless, it was considered controlling precedent, as it upheld the Minnesota Court's decision (Denniston).

2. Obergefell v. Hodges (2015)

In 2015, several same-sex couples challenged the constitutionality of state bans on same-sex marriage or refusals to recognize legal same-sex marriages performed in another state. In a

five-four decision, the Court overruled *Baker* in *Obergefell v. Hodges* and struck down state bans, holding that the Fourteenth Amendment requires states to recognize and license same-sex marriages. The *Obergefell* Court argued that “[t]he history of marriage is one of both continuity and change” (6) and that “changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations” (7). The Court pointed to the gay and lesbian rights movements during the twentieth century, shifts in public attitudes, and the Court’s other substantive due process cases (such as *Bowers v. Hardwick*, *United States v. Windsor*, *Griswold v. Connecticut*) as support for this changed understanding and as support for a right to same-sex marriage (*Obergefell v. Hodges* 6-10). Rather than adhere to the *Glucksberg* test, the *Obergefell* Court believed that tradition and history were only the *starting* points of the inquiry (10-11) because “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied” (18).

The Court concluded that four principles support a fundamental right to same-sex marriage. First, as supported by the Court’s precedents, the right to marriage is “inherent in the concept of individual autonomy” (12). Second, marriage is unlike any other intimate association, and same-sex couples have just as much of a right to enjoy it (13-14). Third, same-sex marriage protects children and families (14-16). Fourth, marriage is foundational to the nation’s social order and is treated as such by the States (16-17).

Though *Obergefell* was a substantive due process case, the Court also inferred a right to same-sex marriage from the Equal Protection Clause of the Fourteenth Amendment. The Court argued that the two Fourteenth Amendment clauses are connected, though not always applicable to the same extent (19). Nonetheless, the liberty for same-sex couples that is derived from the

Due Process Clause is supported and informed by the Equal Protection Clause: “the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution” (21). The right to marry is fundamental, and under the Equal Protection Clause, this right must extend to same-sex couples.

Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito filed dissenting opinions. Chief Justice Roberts, joined by Justices Scalia and Thomas, argued that there is no basis in the Constitution or the Court’s precedents supporting a fundamental right to same-sex marriage (Roberts, Dissenting opinion, *Obergefell v. Hodges* 2-3). It is thus up to the States to regulate through the people’s elected representatives (2). He believed that the *Obergefell* Court had repudiated the Nation’s tradition and history, in which the *core* definition of marriage (a union between one man and one woman) had always been maintained, even in the Court’s jurisprudence (6-8). Thus, he felt as though the Court ignored *Glucksberg* and returned the Court to *Lochner*’s methodology (19). Chief Justice Roberts acknowledged that there *is* a fundamental right to marriage but that the Constitution does not require States to define marriage in a way that includes same-sex couples (15-16), especially because when the nation was founded, and throughout the nation’s history, every State defined marriage traditionally (6). Chief Justice Roberts additionally noted that the democratic process was prematurely cut off, the Court had disparaged those holding traditional views of marriage, and the decision would create difficulties for religious liberty cases (despite what the Court said to the contrary) as well as the Court’s ability to constrain itself from claiming the existence of other fundamental rights based on personal preference (20-21, 26-29).

Justice Scalia’s dissent, joined by Justice Thomas, echoed many of Chief Justice Roberts’ points, emphasizing that states’ definition of marriage at the time of the Fourteenth

Amendment's ratification decidedly resolved the constitutional question about same-sex marriage (Scalia, Dissenting opinion, *Obergefell v. Hodges* 2-4). He criticized the Court for "see[ing] what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not" (7). Moreover, Justice Scalia pointed out that the Court is an unrepresentative sample of the American people. Therefore, making this kind of decision violates the fundamental principle of "no social transformation without representation" (6). He believed this decision, made by unelected lawyers, robbed the American public of making this choice for itself (5-6).

Justice Thomas's dissent, joined by Justice Scalia, focused on the problems with substantive due process as a doctrine as well as the Court's definition of liberty (Thomas, Dissenting opinion, *Obergefell v. Hodges* 3). He argued that "liberty" refers to negative rights, meaning that government officials cannot take certain actions against an individual, rather than positive rights, which refers to individuals being entitled to government benefits (9-11). Same-sex couples are allowed to cohabitate, establish homes, raise children, have private religious ceremonies, and even have civil marriages in some states. Because the government has not physically restrained same-sex couples from living their lives in the ways they choose to, these couples have not been denied liberty, as they are not entitled to state benefits (9-10). On the surface, this argument about not being physically restrained or deprived of negative liberty may seemingly contradict Justice Thomas's *Lawrence* dissent. In *Lawrence*, Justice Thomas would have upheld the Texas statute criminalizing homosexual intimate conduct, even in the home, notwithstanding his personal opinion about the law itself. In other words, he would have upheld a statute infringing upon individuals' negative liberty. However, Justice Thomas's argument in

his *Obergefell* dissent was making the assumption that the *Obergefell* Court was correct that substantive due process *exists*, a premise he does not agree with. Given that he does not believe that substantive due process is a valid legal doctrine, he does not think that the *Lawrence* or *Obergefell* petitioners have a claim under the Due Process Clause.

Justice Thomas also shared Chief Justice Robert's worries that the *Obergefell* decision would negatively affect other areas of law and threaten religious liberty (13-16). Finally, Justice Alito's dissent emphasized the *Glucksberg* test, reiterating many of the same points about why same-sex marriage is not a protected, fundamental right (Alito, Dissenting opinion, *Obergefell v. Hodges*). He also worried about the consequences of the Court being able to invent and impose new rights on the American people (2).

3. *The Stare Decisis Considerations*

Justice Thomas is likely to overrule *Obergefell* if the Court is asked, given his disdain for substantive due process. As the *Obergefell* dissenters acknowledged, the traditional definition of marriage has prevailed for thousands of years, with new conceptions of marriage growing in popularity in the late twentieth and twenty-first centuries. In addition, no state recognized same-sex marriage before 2003 (Compton). Moreover, marriage has traditionally been a state issue. Therefore, same-sex marriage fails the *Glucksberg* test. Furthermore, in cutting off democratic debate prematurely and potentially throwing religious liberty (which is enumerated in the Constitution) into doubt, there is reason to believe that the originalist Justices will view *Obergefell* as quite egregious. Because potential life is not implicated in same-sex marriage in the same way as abortion, the Justices may view the decision as less erroneous, but erroneous nonetheless.

Several of the Justices' *stare decisis* criteria would support overruling *Obergefell*. First, *Obergefell* is much younger than *Roe* and *Casey*. *Obergefell* has been law since only 2015, making it less than a decade old. If the Justices were willing to overturn a fifty-year-old precedent, they are unlikely to have a problem overturning one significantly younger. *Obergefell* is also connected to arguments about liberty and autonomy made in previous substantive due process cases and has a connection to the fundamental right to marry protected in the Court's precedents (whether that fundamental right should have been extended is a separate question). Nevertheless, it is the only decision involving same-sex marriage to date, and the originalist Justices are likely to view its reasoning as a slippery slope for other decisions they do not favor. For example, Chief Justice Roberts argued in his *Obergefell* dissent that the majority's reasoning offered no principled reasons for marriage being limited to two people other than the Court's own assertion. Its reasoning could easily extend to polyamorous unions or other types of unions that are not deeply rooted, that are not socially acceptable, and that could create difficult legal questions—such as those related to birth certificates and child custody (though Chief Justice Roberts was careful to clarify that he does not believe that same-sex marriage is analogous to these other types of unions [Roberts, Dissenting opinion, *Obergefell v. Hodges* 20-21]). The originalist Justices may see the egregiousness of *Obergefell* amplified by these potential future legal and doctrinal consequences.

Moreover, because same-sex marriage is still a moral question, supported by many but also opposed by many, given the doubtful constitutionality of the right, overruling *Obergefell* would return the issue to the people. Justice Kavanaugh expressed in his *Dobbs* concurrence that when the Constitution is neutral on an issue, so must the Court be (3). This consideration is bolstered by *Obergefell* not being entirely accepted, as twenty-five to thirty-five states still retain

dormant same-sex marriage bans (Aguilera; Robinson and Rubin). Of course, many states may choose to repeal the bans should they become active if *Obergefell* is overturned. However, the number is still large enough to believe that a significant portion of the country may not have changed its views.

The *Obergefell* dissenters also expressed serious concerns about the future of religious liberty in light of a fundamental right to same-sex marriage. Even during the *Obergefell* oral arguments, Solicitor General Donald Verilli acknowledged that whether a religious college could lose its tax-exempt status as a result would be an issue to consider (38:09-38:34). One case, *Davis v. Ermold*, might have brought a related question before the Court had the Court not denied the petition for a writ of certiorari. In the case, Kim Davis, a Kentucky county clerk, was sued for refusing to issue marriage licenses because it would violate the tenets of her faith (Thomas, Statement, *Davis v. Ermold* 2). During the litigation process, the Sixth Circuit Court of Appeals held that she was not protected under qualified immunity and could be held personally liable (Dominguez and Stracqualursi). Justice Thomas concurred in denying certiorari because the case did not clearly present questions about *Obergefell*. However, in a separate opinion, joined by Justice Alito, Justice Thomas asserted that Kim Davis would not be the last victim of *Obergefell*, in which the Court forced “that choice upon society through its creation of atextual constitutional rights and its ungenerous interpretation of the Free Exercise Clause, leaving those with religious objections in the lurch” (3). He implied that state authority might be unable to create religious exemptions in light of *Obergefell*. He also claimed that *Obergefell* opened the door, by doing so itself, for the government to label religious individuals and those with deeply held traditional values as bigots, which is what a member of the Sixth Circuit panel did (3).

If it is true that *Obergefell* poses a problem for religious liberty in future cases, the originalist Justices may come to view *Obergefell* as being undermined by the outcome of those cases, especially if they find ways in those subsequent cases to narrow the scope of the *Obergefell* holding. Given that religious liberty is an enumerated right, protected in the very first amendment of the Constitution, the Justices are likely to believe that it retains precedence over a right that is not explicitly protected by the text of the Constitution, that fails the *Glucksberg* test, and that is protected by a doctrine the Justices find questionable. At the very least, the Justices may view *Obergefell* as a distortion of another area of law, based on how the *Obergefell* Court characterized those with traditional values and its lack of acknowledgment of the full scope of what religious liberty entails.

The originalist Justices may also see the Respect for Marriage Act (RFMA) as an additional, subsidiary reason to overturn *Obergefell* (“H.R.8404”). The law, passed at the very end of 2022, protects interracial marriages and redefines marriage under federal law as a union between two individuals (rather than just between a man and a woman). It also requires states to recognize legal same-sex marriages from other states. This would mean that even if *Obergefell* is overturned, states would still be required to recognize same-sex marriages that took place in other states. This may assuage the Justices’ concerns about the chaos and other consequences that could arise from overturning *Obergefell*.

Still, there are *stare decisis* factors that might counsel against overruling *Obergefell*. First, *Obergefell* does not present the same workability problem as *Casey*. The holding in *Obergefell* was straightforward—marriage is a fundamental right between two people that states cannot deny to same-sex couples. The reasoning may or may not be principled (in that it can be extended to other types of relationships, for example), but the holding is clear. It does not require

as many subjective judgment calls by the judiciary. Furthermore, the Court is under no obligation to expand the *Obergefell* reasoning to other circumstances, regardless of the logical extension of *Obergefell*'s reasoning, in the same way that the Court is not obligated to overrule other substantive due process cases, despite what the *Dobbs* reasoning might suggest. The Justices could theoretically acknowledge that *Obergefell* was wrongly decided *and* is settled law, refusing to extend the decision or substantive due process more generally.

There are also reliance interests to consider. In contrast to *Dobbs*, *Obergefell* does involve rules of property and contract, which heightens the reliance interests already at stake (Richardson). In addition, it is probable that many same-sex couples have made decisions organizing and structuring their lives based on the assumption that they have the right to get married and have their marriage recognized by any state, in which case an argument can be made that advanced planning is necessary. Though this is an important factor that the Justices are unlikely to ignore, it may not be persuasive enough based on the *Dobbs* decision and the recent Respect for Marriage Act. The Respect for Marriage Act protects same-sex couples' right to have their marriages recognized, even in states that would no longer provide marriage licenses to same-sex couples. This means same-sex couples could travel elsewhere to receive their marriage license and settle in any state they want. The counterargument is that this could burden couples of a lower socioeconomic status. However, given that the Court did not find the burden on economically disadvantaged women compelling in *Dobbs*, this argument may not be convincing. The Court may alternatively find the Respect for Marriage Act unconstitutional, though Cornell Law Professor Michael C. Dorf believes there is a strong argument for the law's constitutionality under the Full Faith and Credit Clause. However, even if the Respect for Marriage Act is unconstitutional, the Court could grandfather in currently married same-sex couples to prevent

chaos and retroactive consequences. Regardless, the Court may see the law as a way to mediate some of the effects of overturning *Obergefell*. Still, if reliance interests are weighed heavily in the Court's decision, it may be enough to prevent them from overruling *Obergefell*.

Support for legal same-sex marriage has moreover increased since the *Obergefell* decision. In 2004, about sixty percent of Americans opposed same-sex marriage, and about thirty-one percent were in favor. These percentages have flipped, with sixty-one percent of Americans favoring same-sex marriage in 2019. Support for same-sex marriage has increased across almost all demographic groups, though there is still a wide partisan gap ("Majority of the Public"). This divide among Americans is very similar, percentage-wise, to the divide among Americans over the issue of abortion, with sixty-one percent of Americans believing that abortion should be legal in most cases and thirty-seven percent saying the opposite ("Public Opinion"). The difference is that the division over abortion has remained relatively consistent over time, whereas support for same-sex marriage has risen dramatically in the same period. Additionally, the issue of abortion is not as black and white because there are a variety of positions on when the cut-off should be, influencing polling numbers. This may factor into the Court's decision, especially given the media panic that ensued over the possibility of *Obergefell* being overturned following the *Dobbs* decision.

Finally, if religious liberty cases are not significantly affected by *Obergefell*, an argument can be made that *Obergefell* has not been undermined by subsequent facts, law, and circumstances, especially if the Court does not have the opportunity (or refuses to take the opportunity) to decide these issues. This was not a factor the Court entertained in *Dobbs*, but it certainly would not weigh in favor of overruling *Obergefell*. Therefore, while several reasons

may cause the originalist Justices to pause before voting to overturn *Obergefell*, there is still a strong case to be made that they will choose to do so.

Two additional possibilities are worth discussing. First, the originalist Justices may vote to maintain *Obergefell* on equal protection grounds. This is improbable for two reasons. The first is that an interpretation that extends the Equal Protection Clause to same-sex marriage would not be an originalist one, as the Ratifiers did not understand the Fourteenth Amendment to protect same-sex marriage. The second is that *Obergefell* was, at its core, a substantive due process decision with an alternate equal protection rationale tangentially added. In his dissent, Chief Justice Roberts noted this, writing that “[t]he majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow” (23). The Equal Protection Clause was not nearly as crucial to the decision as the Due Process Clause, in contrast to *Loving v. Virginia*, in which the right to interracial marriage was primarily protected under the Equal Protection Clause with an alternate substantive due process holding mentioned at the end of that opinion.

The second possibility is that the originalist Justices will vote to uphold *Obergefell* but create more robust religious liberty protections for government officials, religious institutions, and religious individuals. However, under *Employment Division v. Smith*, the Court held that free exercise does not exempt individuals from adhering to generally applicable valid and neutral laws. In his *Davis* opinion, Justice Thomas argued that *Smith* weakened religious liberty protections and made religious accommodations a part of positive state and federal law (2-4 un).⁹ Nonetheless, the Justices could overrule *Smith*, which Justices Thomas and Gorsuch (as well as Alito) would have done in *Fulton v. City of Philadelphia* (Alito, Concurring opinion, *Fulton v. City of Philadelphia* 53; Gorsuch, Concurring opinion, *Fulton v. City of Philadelphia* 10). In

⁹ Notably and interestingly, Justice Scalia was the author of the Court’s opinion in *Smith*.

Fulton, Justice Barrett agreed that the textual and structural arguments against *Smith* were strong but saw no reason to overrule *Smith* in *Fulton* (Concurring opinion, *Fulton v. City of Philadelphia* 1-3). Justice Kavanaugh joined Justice Barrett’s concurring opinion.

Hence, there are multiple avenues the Court can take regarding *Obergefell*. It may overrule *Obergefell*, but it alternatively may maintain the decision while narrowing the holding to accommodate religious liberty protections. The latter would still raise questions if, for example, the only state employees who can complete a task request religious exemptions. However, the Court may find that dealing with these questions is a better option than completely overturning *Obergefell*.

H. *Lawrence* and *Obergefell*

Lawrence and *Obergefell* cover different aspects of substantive due process rights protected by the Court, but they are related. For example, it would not make much logical sense to overrule *Lawrence* but not *Obergefell*, in which states could ban homosexual intimate conduct but could not ban same-sex marriage. It makes more sense to overrule *Obergefell* but not *Lawrence* (if the Court overrules either). If the Court were to reason that, based on a consistent application of the *stare decisis* criteria, *Lawrence* should be overruled but *Obergefell* should not, it would likely need to include an exception for married same-sex couples, limiting states’ abilities to ban such conduct to unmarried individuals. Regardless, the possibility of either or both precedents being overturned is real. For example, the Court has never held that sexual orientation discrimination is subject to heightened judicial scrutiny. Justice Kennedy had the opportunity to do this in *Obergefell* but did not. This means that although the Court may have unofficially been using some form of heightened scrutiny to strike down laws in sexual orientation cases, like *Lawrence*, the Justices have support for overruling *Lawrence* and for

holding that sexual orientation discrimination is subject only to rational-basis review in future cases. Even so, it is questionable as to whether all the originalist Justices will want to overrule these decisions. Justice Kavanaugh's *Dobbs* concurrence implies he may not be as willing to overrule *Lawrence* or *Obergefell*, especially as the most moderate of the originalist Justices (González and Alberti). Justice Gorsuch may also not be as willing as he authored the *Bostock v. Clayton County* decision, which held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sexual orientation. Though a statutory case, *Bostock* was still a surprising decision from the conservative Justice. Thus, the possibility of either being overturned remains, but it is not inevitable.

I. Contraception

1. Griswold v. Connecticut (1965)

In 1965, the Court decided *Griswold v. Connecticut*, striking down a Connecticut law that prohibited the use of contraception, even for married couples. However, *Griswold* was not the first case that could have decided the constitutionality of state birth control restrictions. There were efforts long before 1965 to get the Court to decide the issue, utilizing laws in Connecticut and Massachusetts as both states had complete bans on birth control (Gillman et al. 413). In 1943, *Tileston v. Ullman* was not heard on the merits because of a lack of standing (the Court held that the physician could not litigate on behalf of his patients). In 1961, *Poe v. Ullman* was also not heard on the merits because of the ripeness doctrine, in which a statute must be enforced before litigation claims can be brought before the judiciary. *Griswold* was the product of a subsequent attempt. Estelle Griswold, the head of Planned Parenthood in Connecticut, and C. Lee Buxton, a gynecologist, were convicted for providing contraception and information on contraception to married couples. Though it was not technically illegal to sell birth control, it

was a crime to use it, making Griswold and Buxton accessories (Farber and Siegel 389).

Griswold and Buxton claimed the statute violated the Fourteenth Amendment, and the *Griswold* Court agreed. Justice Douglas wrote the majority opinion for the 7-2 Court, stating that

we do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation. (*Griswold v. Connecticut* 482)

Justice Douglas did not explicitly use substantive due process to reach the Court's conclusion.

Instead, he reasoned that there is a right to privacy from "specific guarantees in the Bill of Rights [that] have penumbras, formed by the emanations from those guarantees that help give them life and substance" (484). This included guarantees from the First Amendment, the Third

Amendment, the Fourth Amendment, the Fifth Amendment, and the Ninth Amendment (484).

To support this argument, the *Griswold* Court pointed to cases in which certain rights were protected under the Bill of Rights though not found strictly and expressly within the text (482-485). For example, the Court has protected the freedom of association as a part of the First Amendment (482). The Court concluded its opinion by emphasizing the antiquity of a right to privacy and the sacredness of the marriage union:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. (486)

Although an overwhelming majority of the Justices agreed with the outcome in *Griswold*, they did not all agree on the rationale, resulting in three separate concurring opinions. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, did not accept the incorporation of all of the first eight Amendments through the Due Process Clause of the Fourteenth Amendment but agreed that “liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights,” including marital privacy (486). He believed that this privacy right was supported by the Court’s precedents as well as the Ninth Amendment, which demonstrated that there are additional fundamental rights that the Framers believed were protected in the Constitution from the federal government (487).¹⁰ Though Justice Goldberg did not claim that the Fourteenth Amendment incorporated the Ninth Amendment against the states (or that the Ninth Amendment is an independent source of rights), he suggested that the Ninth Amendment provided evidence that the Framers did not intend the Bill of Rights to be exhaustive (492). Thus, he inferred that there are also unenumerated fundamental liberties protected under the Fourteenth Amendment from state government interference (493). In order to determine which rights should receive such protection, Justice Goldberg argued that it is those fundamental rights that are so rooted in the nation’s traditions and conscience and that the government cannot infringe without breaching liberty and justice that is foundational to the nation’s institutions (493). Under this test, the Connecticut law was invalid because “a particularly important and sensitive area of privacy—that of the marital relation and the marital home” does not serve a compelling state interest (495).

Justice Harlan’s concurring opinion followed a logic similar to Justice Goldberg’s. Justice Harlan argued that the Court’s position implied that a connection to the Bill of Rights is

¹⁰ “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” (Constitution of the United States, amend. IX).

necessary for a right to be protected under the Due Process Clause of the Fourteenth Amendment, a perspective he believed was mistaken (499-500). Justice Harlan thought that the Due Process Clause extends beyond incorporation and protects rights ““implicit in the concept of ordered liberty”” (qtd. in *Palko v. Connecticut* 319). In other words, he believed that the Due Process Clause protects rights independently (500). This was also the position Justice Harlan took in his dissent in *Poe v. Ullman*. To restrain the judiciary, Justice Harlan argued that judges must respect history, the basic values underlying society, federalism, and the separation of powers (501). He accepted that judges might reach different conclusions but nonetheless felt that the method would help keep the judiciary in check when determining which rights are protected under the Due Process Clause (501-502).

Finally, Justice White concurred, arguing that the right is protected under the liberty provision of the Fourteenth Amendment. Citing previous Supreme Court cases, he pointed to protections for marital rights, rights to establish a home, and childrearing rights as being protected under the Fourteenth Amendment (502). This indicates that there is an area of family life that the state cannot infringe upon without a compelling justification (504). Having established that the Connecticut law infringes upon the marital relationship, which is a part of this area, Justice White then focused on the statute’s justification. He believed Connecticut’s justification that the statute hedges against illicit sexual activity was a legitimate end (505). However, the use of the statute as a means for achieving this end was not “reasonably necessary” for its effectuation (504) because it is difficult to explain “how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State’s policy against such relationships” (506).

Justice Black and Justice Stewart filed separate dissenting opinions, though both also joined each other's opinions. Justice Black claimed that while the Constitution "protect[s] privacy at certain times and places with respect to certain activities," it does not protect a general "right of privacy" (508). For example, a "right of privacy" cannot substitute the right against "unreasonable searches and seizures" (509). Justice Black also did not agree that the Ninth Amendment or Due Process Clause of the Fourteenth Amendment invalidated the statute. He believed this analysis was "merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive" (511). He reasoned that because the Constitution does not expressly or implicitly allow the Court to supervise the legislature, nor does the text of the Constitution forbid the Connecticut law, it should not be struck down (527).

Justice Stewart found the law to be "uncommonly silly." However, he asserted that the wisdom of the law is not the same as whether it violates the Constitution (527). He did not believe that the First, Third, Fourth, and Fifth Amendments were related and, therefore, could not provide compelling justifications for the law (528-529). Moreover, he claimed that the Ninth Amendment is a truism "[a]nd, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining 'the wisdom, need, and propriety' of state laws" (528-530). Finally, he asserted that there is no general right of privacy and no constitutional provision that can provide a basis for striking down the law (530).

2. *Eisenstadt v. Baird* (1972)

Several years after the *Griswold* decision, in 1972, the Court broadened the *Griswold* holding in *Eisenstadt v. Baird*. In *Eisenstadt*, William Baird distributed contraceptives to an unmarried woman despite a Massachusetts statute prohibiting the distribution of contraceptives

to unmarried individuals and Baird not being a legally authorized distributor. The Court struck down the Massachusetts law based on the Equal Protection Clause of the Fourteenth Amendment, as the statute treated married and unmarried individuals unequally without a rational basis for doing so. The Court noted that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike” (*Eisenstadt v. Baird* 453). The *Eisenstadt* Court refashioned the right of privacy from being rooted in a marital union to the individual, stating that

the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (453)

Therefore, the Court noted that even if *Griswold* did not prohibit bans on contraception, a statute that banned contraceptives only for unmarried individuals would be underinclusive and invidious (454). Ultimately, this shift in focus to the privacy rights of the individual would be significant for later abortion cases as well as cases involving minors’ access to contraceptives (Farber and Siegel 392; *Roe v. Wade* 169-170).

3. *The Right to Obtain Contraception*

In summary, the *Griswold* majority protected the right of married couples based on a right of privacy created by the penumbras of the rights guaranteed in the Bill of Rights. The right was extended via rational-basis equal protection review to unmarried individuals in *Eisenstadt*. However, both opinions attempted to define a sphere of personal liberty and a right of privacy—in *Griswold*, for a married couple, and in *Eisenstadt*, for the individual. The trajectory from

Griswold to *Eisenstadt* had significant implications for future cases protected under the liberty provision of the Due Process Clause of the Fourteenth Amendment, such as *Roe*. These issues and questions were relatively new to the Supreme Court's docket at that time. In making the penumbral argument in *Griswold*, Justice Douglas explicitly attempted to distance the Court's decision from *Lochner* (481-482). By the time *Eisenstadt* was being decided, the Court had just decided *Reed v. Reed*, which struck down a gender-based law, for the first time, based on rational-basis equal protection review (though the Court would shift to intermediate scrutiny—which makes more sense given the result in *Reed*—a few years later in *Craig v. Boren*). Although it may not have made much sense for the Court to extend the right to contraception to unmarried individuals based on rational-basis review, it makes more sense when considering these other cases that the Court was deciding around the same time. Furthermore, when *Eisenstadt* was decided, *Roe* had already been argued before the Court and *Eisenstadt* was likely written with the future *Roe* opinion, and right to obtain an abortion, in mind (Farber and Siegel 392).

Thus, there are strong reasons to criticize the Court's justifications in *Griswold* and *Eisenstadt* themselves, but today, these decisions are understood to protect a right to contraception for all individuals under substantive due process as a part of the kind of reproductive liberty that the Court recognized in its abortion jurisprudence. Notably, although Justice Stewart dissented in *Griswold*, his views shifted by the time *Roe* was decided. He concurred with the *Roe* Court, stating that

the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that

the Connecticut statute substantively invaded the ‘liberty’ that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such. (167-168)

In a footnote in his *Dobbs* concurrence, Justice Thomas also noted that post-*Griswold*, the Court moved away from the penumbral argument made by Justice Douglas and accepted *Griswold* as a substantive due process precedent (3).

4. *The Stare Decisis Considerations*

Given their jurisprudential views, all the originalist Justices will likely view *Griswold*¹¹ as erroneous or egregiously wrong. They are likely to argue that while there is a deeply rooted history and tradition regarding marriage, there is no deeply rooted right to or tradition of contraceptive use within marriage. On the contrary, historically, and traditionally, marriage and procreation have been inextricably connected (Lee et al.). It is also improbable that these Justices will acknowledge a general right to privacy in the Constitution, given the lack of a textual basis, bolstered by the lack of strength of the *Griswold* Court’s penumbral argument that subsequent Courts have distanced themselves from. Therefore, although *Griswold* and *Eisenstadt* are currently protected under the Due Process Clause of the Fourteenth Amendment, the Justices may latch onto, what they consider, the questionable and weak reasoning of the original opinions, increasing the egregiousness of those decisions.

In considering how entrenched the precedent is, one criterion supporting the overturning of *Griswold* is that subsequent facts and law have undermined it. The rationale in *Griswold* created a foundation for the Court to expand and reshape reproductive rights in *Eisenstadt* to that

¹¹ and *Eisenstadt*

of the individual. The *Eisenstadt* opinion was written with abortion rights in mind, and *Eisenstadt* was an important steppingstone jurisprudentially and logically to the legal arguments made by the *Roe* Court. In this sense, the *Griswold* decision is not isolated, and in overruling the central holdings of *Roe* and *Casey*, the *Dobbs* Court undermined reproductive liberty and bodily autonomy arguments made by pro-contraception and pro-choice advocates. In addition, though *Griswold* is older than *Roe* by several years, it is close in age to *Roe*, and its close connection to the *Roe* decision is not likely to weigh in its favor in the eyes of the originalist Justices.

There are also no rules of property or contracts implicated in *Griswold*, and the reliance interests are likely to be viewed as similar to the reliance interests in *Dobbs*. The purpose of contraception is to prevent pregnancy, which is unplanned and arguably does not require precise advanced planning. Moreover, even if states ban contraceptives, individuals will still be able to organize their reproductive lives in response to those state decisions, the same as in *Dobbs*. Overruling *Griswold* would allow the people of each state to make their own moral determinations on the issue through their elected representatives. However, there is a compelling counterargument. While about a quarter of women obtain an abortion (at least pre-*Dobbs*) before they turn forty-five years old (according to one estimate [Jones and Jerman 1288]), an overwhelming number of women use some form of contraception at some point during their life (Daniels and Abama). The purpose of obtaining an abortion is to deal with an unwanted pregnancy, but the purpose of using contraception is to *prevent* an unplanned pregnancy. This differentiates (at least some) contraception from abortion in a significant way. Whether the originalist Justices will view the reliance interests in *Griswold* as similar to *Dobbs* or different enough remains somewhat of an open question.

A criterion that may convince the originalist Justices to uphold *Griswold* is the general acceptance of contraception as a moral means for preventing pregnancy. Contraception is one of the most widely accepted moral issues, with over ninety percent of Americans viewing it as morally acceptable as of 2019 (Brenan; “Very few Americans”). The percentage of those who view contraception as moral is about the same for those who identify as conservative or very conservative and those who identify as liberal or very liberal (Brenan). Even among religious individuals, including many Catholics, contraception is viewed as acceptable and used by many individuals in these communities (Brenan; Jones; Newport). This does not mean there is no controversy over the issue, specifically and especially among Catholics, but views among the religious are not uniform (Newport). Regardless, the issue of contraception is not nearly as contentious as abortion, nor is it as contentious as homosexuality and same-sex marriage.

While there may be broad agreement generally on the morality of contraception, there is the more complicated question of what counts as contraception, especially as it relates to the issue of abortion. For many pro-life individuals, life begins at the moment of fertilization. Others believe implantation is required before life begins, which occurs a few days after fertilization (“Conception”). Some types of birth control prevent fertilization, while others prevent implantation. This has important implications for the kinds of birth control methods viewed as abortifacient, and there is often disagreement about which kinds fall into each category (Desantis; Dreweke). Even before the *Dobbs* decision, some states had already placed limitations on certain types of contraception and their accessibility, though no state has completely banned all contraceptives (and it does not seem likely that any will in the future [Bendix; Michaelson; Ollove]).

There are other considerations that may influence a decision on *Griswold*. In 2014, the Court decided *Burwell v. Hobby Lobby Stores*. In *Hobby Lobby*, the Court held that under the Religious Freedom Restoration Act, pro-profit corporations could obtain exemptions from requirements to cover contraceptives in employer-provided health care plans that violate the entity's religious convictions. In 2020, the Court ruled that the federal government had acted lawfully under the Affordable Care Act in expanding eligibility for religious exemptions and adding a moral exemption (*Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*). The *Dobbs* decision may impact future contraceptive challenges that may narrow and consequently legally undermine the *Griswold* holding, even if *Griswold* is not overruled entirely. If *Griswold* is narrowed or overruled, interstate commerce considerations may also become a salient issue the courts will have to consider.

All these questions have implications for the workability of *Griswold*. *Griswold* did not include a discussion comparing contraception that prevents fertilization and contraception that prevents implementation or delve into detail about what counts or does not count as contraception. Many open medical questions exist, especially as new research emerges, and religious liberty considerations are factored in. This suggests that even if *Griswold* is not unworkable in the same way that the “undue burden” standard was, its continuation (or lack thereof) leaves many questions for the Court to confront in the future.

I. A Quick Aside: *Loving v. Virginia* (1967)

In his *Dobbs* concurrence, Justice Thomas did not mention *Loving v. Virginia*, the case in which the Court struck down a Virginia anti-miscegenation law under the Fourteenth Amendment, as an example of a wrongly decided substantive due process case. This was criticized as hypocritical, as Justice Thomas is himself in an interracial marriage, and many have

expressed concern that *Dobbs* could have negative consequences and implications for interracial marriage (Getahun; Hall and Han; Suter and Cahan). These fears are likely unfounded for at least two reasons. First, *Loving* was mainly protected under the Equal Protection Clause. The Due Process Clause provided an *alternative* holding at the end of the Court's opinion, but it was essentially the inverse of the *Obergefell* opinion. *Obergefell* purported to include an equal protection rationale, but the right to same-sex marriage is rooted in substantive due process. In *Loving*, the right to interracial marriage is rooted in the Equal Protection Clause. The balance of the two clauses in *Loving* is different than in *Obergefell*.

Second, in footnote one of his *Casey* dissent, Justice Scalia completely dismissed this fear, arguing that text supersedes tradition. He argued that the Equal Protection Clause explicitly prohibits racial inequality, which contrasts with *Roe*, which sought to *create* a right not found in the text of the Constitution contrary to the nation's tradition (980n1). Even if one or both rationales are unconvincing, it is highly improbable that *Loving* is any real danger for the foreseeable future.

J. Conclusion

This analysis indicates that *Lawrence*, *Obergefell*, and *Griswold* are not entirely safe from future decisions by the Supreme Court. Even if all three precedents protect different rights, they are connected constitutionally to *Roe* and *Casey*. Still, important differences distinguish these precedents from the Court's abortion jurisprudence. *Lawrence*, *Obergefell*, and *Griswold* have not deepened division and debate in the same way abortion has. The movement to overturn *Roe* and *Casey* has been loud, continuous, and persistent for decades (Fritze). Furthermore, with the possible exception of *Griswold* in certain circumstances, they do not involve potential human life in the same way *Roe* and *Casey* did.

In addition, this analysis made multiple assumptions. First, it assumed the Justices would be principled and consistent in applying *stare decisis*, which may not be accurate. The parameters for how the *stare decisis* factors are or should be applied in various circumstances and how they should be weighed against each other are not entirely clear. As discussed, specific criteria may weigh in favor of overruling or upholding a decision depending on how the Justices view the decision. The factors that suggest either overruling or maintaining each of these precedents do not entirely overlap, and the way in which the same *stare decisis* criteria look in these precedents varies based on the unique circumstances and legal reasoning in each case. It is possible to manipulate some of these criteria to achieve desirable outcomes. Moreover, even if the Justices are not malicious, their personal preferences may subconsciously influence their reasoning and decision-making. For example, *Griswold* has a stronger tie to *Roe* than *Obergefell* and *Lawrence* because *Griswold* and *Roe* involve procreation in a way the latter two cases do not. However, given the strong public sentiment in favor of contraception, the Justices may not find overruling *Griswold* to be a palatable result. This also means that the *Dobbs* Court's insistence that public opinion should not influence legal decision-making is likely untrue. The Supreme Court often stays near mainstream sentiments, potentially because the Justices' beliefs track public opinion and because the Court wants to preserve its legitimacy and credibility in the eyes of the American people (Thomson-DeVeaux).

Consequently, this suggests that even if the originalist Justices *want* to follow Justice Thomas's lead and reconsider these other substantive due process precedents, it may be a while before they do so. The *Dobbs* decision stirred a significant amount of controversy and outrage, even leading to demonstrations outside the Justices' homes after a draft of the opinion was leaked to the public in May 2022 (Howe and Sullivan). The Court may worry about destroying

its credibility by deciding other substantive due process cases at this time. Furthermore, this analysis assumes that the Court will be *asked* to reconsider these other cases. *Lawrence*, *Obergefell*, and *Griswold* will remain law if no opportunities to overrule them arise. This is especially true if the Court does not grant certiorari, which it is not required to do under its appellate jurisdiction. Justice Barrett suggested this strategy in her article, “Originalism and Stare Decisis.”¹²

Constitutional law is often complex and politically charged, especially in the area of substantive due process. Therefore, how Justices will vote in different cases is often unpredictable. Nonetheless, the purpose of this analysis was not to make definitive predictions based on the *stare decisis* factors but to exhibit how they *may* be considered and applied by the originalist Justices and present the possibility that these decisions may be overturned in the future. It may be a while, however, until there are definite answers.

VII. Conclusion

On the surface, it appears that originalism and precedent are mutually exclusive—if judges interpret constitutional provisions based on what they meant to reasonable citizens at the time of ratification, then non-originalist precedent cannot stand. This is the position of Justice Thomas. However, this paper demonstrated that originalism and precedent *can* work together, either as an originalist matter (the Article III justification) or as an exception to the doctrine. Though there is significant overlap in the criteria the originalist Justices would consider, it is essential to remember that the calculus is unlikely to be the same for each Justice. The more

¹² “[T]he Court’s discretionary jurisdiction generally permits it to choose which questions it wants to answer. This in and of itself keeps the most potentially disruptive challenges to precedent off the Court’s docket” (Barrett, “Originalism” 1930).

moderate Justice Kavanaugh may not view cases through the same lens as the more conservative Justice Barrett. Thus, while overruling substantive due process precedents is within the realm of possibility, there is no sure way to predict what the Court will do in future cases. In *Dobbs*, Justice Kavanaugh went out of his way to reassure the public that *Dobbs* was limited to abortion, and Justice Thomas went out of his way to insist that the Court should reconsider substantive due process. Justices Gorsuch and Barrett did not join either concurrence. Nonetheless, understanding how the *stare decisis* criteria can operate in these cases is important for understanding its role in Supreme Court jurisprudence.

Originalism and the doctrine of precedent each provide a means for creating feasible constraints on the courts, but neither is perfect. One of the dangers of *stare decisis* (and originalism) is its ability to be manipulated for personal and political reasons (disguised as law) or subconsciously influenced by cognitive biases. For example, in *Dobbs*, the Court and the dissenters viewed the workability of the “undue burden” standard differently. It is possible that a reason for viewing the standard as either workable or unworkable was consciously or unconsciously influenced by the personal views of the Justices on abortion, although this would be difficult to prove. Furthermore, in most situations, cases before the Court can be read broadly or narrowly in order to distinguish them from past precedents. Thus, it is possible to pick and choose evidence, consequently making the strength of the intended constraint variable. This reveals that a real and tangible difficulty in constraining the judiciary exists because there is inherently a significant amount of room and scope for discretion within judicial adjudication and interpretation.

Therefore, an important area of future research will be discovering whether the Court consistently applies *stare decisis* across cases, issue areas, doctrines, Justices, and time. It will

also be essential to understand how *stare decisis* is used by the non-originalist Justices and how this compares to the originalist Justices. This refers to the other conservative (pragmatic originalist) Justices on the Court—Justice Alito and Chief Justice Roberts—but also to the liberal Justices—Justice Kagan, Justice Sotomayor, and Justice Jackson. Ultimately, as the Supreme Court continues to be an influential institution in the American political system, its decisions will have significant consequences for *all* citizens. The use of *stare decisis* as a constraint may not, in reality, be a meaningful one, but Americans must recognize this if it is, in fact, the case. A better understanding of the United States’ most important court will help the nation decide how to move forward socially, politically, and culturally.

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